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No. 350

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United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 24245

PASQUALE PALERMO,

Plaintiff-Appellee,

—against—

LUCKENBACH STEAMSHIP COMPANY, INC.,

Defendant-Appellant.

BRIEF AND APPENDIX FOR PLAINTIFF-APPELLEE

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United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 24245

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BRIEF FOR PLAINTIFF-APPELLEE

Preliminary Statement

By the issues posed in the appeal from a unanimous jury verdict for the plaintiff-appellee,* left undisturbed by the trial Judge upon full consideration of defendant-appellant's* motions, it follows that defendant misconceives the necessary elements and purpose of appellate review. Defendant again seeks to argue a defense that was rejected by the triers of the facts, in almost complete disregard of the record which substantially supports the verdict and rulings below. By its arguments on a clearly inadequate appendix, and its refusal to discuss the facts and conclusions favoring plaintiff's cause, necessarily drawn in the light of the verdict, defendant fails to follow the rule of appellate appraisal on the complete record of testimony and exhibits. Because defendant's statement of facts amounts to a misstatement of facts, and the issues posed on page 4 of

* Plaintiff-appellee is hereinafter referred to as plaintiff; defendant-appellant as defendant.

defendant's brief are completely out of context with the true state of the record, plaintiff hereinafter will first set forth what he considers the proper issues on appeal, and then will recite a statement of facts supported by a fair and more comprehensive appendix gleaned from the entire record herein.

The Issues on Appeal

1. Should a verdict be assailed on the ground of an alternative safe passageway where the testimony from all witnesses, including those of the shipowner-defendant, as well as the log of the vessel, clearly show that the port passageway necessarily used by the plaintiff was unsafe, and that the alternative starboard passageway presented even greater hazards of cargo gear in operation and drafts in the process of discharge?

2. Where the medical testimony unanimously agrees that the 45 year old plaintiff's entire right upper extremity has become 100 percent industrially disabled, an almost immobilized and useless appendage by reason of the accident involved herein, forever disabling him from engaging in any manual work of the nature he knows, can the trial Court's decision to deny the motion contending excessiveness on the verdict of $65,000.00 be assailed? The Court below considered all the facts and concluded there was "substantial evidence to support the verdict" as "The plaintiff also established by medical testimony that the plaintiff was very seriously injured, and that the right upper extremity of his arm was practically completely disabled * * *" (12a of defendant's appendix).

With those issues in mind while reading the completely supported statement of facts hereinafter, the conclusion is inescapable that the appeal by defendant is *pro forma*, designed more to delay execution on a properly grounded

judgment than to present fairly considered issues on a record to be read in the light of the findings favoring plaintiff.

Statement of Facts

On February 16, 1955, shortly after 7:00 P. M., the plaintiff, as a hatch foreman employed by Turner & Blanchard, Inc., proceeded on the port passageway to join his gang in the after part of No. 2 hatch of the C-4 cargo vessel known as the MARINE SNAPPER, which lay starboard to the 35th Street Pier, Brooklyn, New York, for the purpose of cargo discharge on that side. While so proceeding in the port passageway between the raised deck house and the port side he was caused to sustain injuries which are the subject matter of this suit.

All that is stated above is accepted by defendant in its brief; substantially all that follows it ignores or disputes.

The Physical Layout and Condition of the Place of Accident:

Hatch Boss Guarracino, in charge of the gang in the forward part of the same hatch in which plaintiff's gang was working in the after portion, testified that a winch drum was located about a foot away from the port passageway leading to the No. 2 hatch, as demonstrated in a photograph taken by the defendant, and that a sill or three inch elevation at the forward end of this passageway was parallel with the end of the drum (1a, 2a, 3a, 7a).*

That prior to the accident he had noticed grease spots in the area; the winch drum was greased and oiled by members of the ship's crew (6a, 9a), and that the runners there were covered with grease by means of a mop-like brush

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* Numbers in parentheses with suffix "a" refer to page in plaintiff-appellee's appendix to brief.

dipped into a pail (9a, 10a).. The location of these grease spots was fixed by the witness to be "all around that deck," "grease spots on that deck" (10a, 11a).

This witness also stated that at the time of the accident, after all the longshoremen had already returned to their positions following the supper break, at approximately five or ten minutes after 7:00 P. M., when the accident happened, the area was dark (3a, 5a), that "As far as illumination, there was none, there were no lights directed at this particular spot" (7a).

Significantly, this is corroborated by the ship's rough deck log entry made at 8:00 P. M., where is recorded the accident when plaintiff tripped on the "treadle" or sill on the forecastle deck, port side, at about 7:05 P. M., with the admission *"Bulkhead lights out, two. Electrician replaced"* (14a, emphasis supplied).

As regards the starboard passageway, Guarracino testified "it is safer to walk on the port side, because on the starboard side the drafts are coming out of the different hatches" (3a, 4a). He explained this danger by pointing out that the discharge operation was already in progress from all hatches over the inshore or starboard side, as all gangs had preceded the hatch bosses aboard by about 10 to 15 minutes (3a, 4a, 7a), emphasizing that he and the plaintiff had used the port passageway as "We always go on that side, that is a safety measure that we take" (8a). When defendant's counsel suggested the alternative of going alongside the starboard side by the officers' house, the witness intimated there was no permission to go on top of the officers' deck, as "We don't go up there" (8a). He denied any room to pass the winchmen in position in the thwartship passageway shown in Exhibit A (9a).

On page 2 of defendant's brief appears the incorrect statement that the testimony of its witness Purcell, a supercargo clerk, went unchallenged as to the safety of the starboard passageway. On the contrary, this witness admitted during cross examination that he himself used the port passageway during cargo discharge on the starboard side because it was safer (26a).

Sorrentino, a signal man who preceded the hatch bosses before discharge of cargo had commenced, came to the scene of the accident shortly after it occurred and pointed out to a ship's representative that the bulkhead light was out (12a, 13a).

Plaintiff's testimony was substantially in accord with that of Guarracino, stating that at the time of accident the gangs were discharging on the starboard side (16a), that after the accident he observed grease on his clothing (16a), and that the mast lights over No. 2 hatch were about 100 feet away, forty feet up in the air, directed to the hatch itself and the starboard side, without any illumination on the place where he fell (18a, 19a).

Defendant's witness Cerase, head foreman for the work done at the Luckenbach pier, testified that the winches are oiled and greased at least once a day, and that the runners were greased the day before the accident by applying grease from a pail by use of a brush, a couple of brush applications made on the Number 2 winch itself (27a, 28a).

Manner of Happening of Accident:

Guarracino preceded the plaintiff to their gangs already at work in the No. 2 hatch, when "all of a sudden I heard like a thud and a moan. I looked back and Mr. Palermo is on the floor" (4a). The plaintiff was on the ground over the sill, with his feet pointed to it (4a, 5a). This witness was unable to distinguish anything on the deck, par-

ticularly grease spots, for "How could I see if it is dark?" (7a). The port winch near where plaintiff fell had been in use during the day (11a).

Plaintiff testified that he slipped and while attempting to balance himself, tripped over the sill (19a). As he fell the weight of his body went on his outstretched right hand, he being right-handed (16a). As he slipped, he felt "Something smooth, fast" underfoot (16a). The exact words recorded in the ship's log were: "Patsy Palermo, hatch Boss No. 2 after gang tripped and fell, injured right elbow and hand. He tripped on treadle by bridge house" (14a).

Charge of Court and Rulings on Motions to Dismiss:

Defendant complains that the Charge herein did not present its position as regards a non-existent safe alternate passageway, and seeks to assail the verdict on the ground of plaintiff's alleged contributory negligence, though it agreed to a general verdict without special interrogatories as to the extent of such contribution, if any.

That the jury was adequately charged in these respects appears from the Charge as published in defendant's appendix to brief. On page 7a of said appendix there is the following portion of the Charge:

> "• • • Of course, the burden is on the plaintiff to show that he was free from contributory negligence. As I recall, the plaintiff said that he had gone over this passageway before and that he had noted the grease spots. Knowing that, should he have been more careful on his return than he was?
>
> The defendant urges that if the plaintiff knew there were grease spots on the port side in the passageway leading to Hatch 3 (*sic*), why, he should have used the starboard; to which the plaintiff responds that that

would not have been a wise move because the unloading was in progress to the shore, the winches were in operation and that the unobstructed passageway was on the port side."

Immediately thereafter, the learned trial Judge discussed the principle of contributory negligence and its effect on diminishing any recovery.

As regards defendant's complaints referred to the Court's decision not to disturb the verdict, it is clear that the basis of said decision was the Court's appreciation of the substantial evidence to support the verdict, that plaintiff was "very seriously injured," conceding that though the Court's award might have been less than that given by the jury, nonetheless plaintiff herein sought and obtained the fair verdict of the jury. In its opinion the Court below observed as follows:

"It is not for the court to determine by mathematical formula the elements that are involved in pain and suffering, and nature and extent of injury; and the prognosis of the doctors of permanent disability was apparently received by the jury with full effect" (p. 12a of defendant's appendix).

There is incorporated by reference in this opinion the analysis of cases in point set forth in the *Selock* memorandum opinion, also found in defendant's appendix on pages 13a and 14a.

Evidence of Injuries and Damages Flowing Therefrom:

At the time of the accident plaintiff was 45 years of age (14a), earning between $75.00 to $100.00 a week at an hourly rate of $2.25, and $4.00 an hour for overtime. He had not worked since the date of the accident (15a, 17a).

Now he must eat with his left hand, undergoing the helplessness and humiliation of having others cut his food and put on his clothing (18a). His pain is steady, primarily by reason of a screw in his elbow, his fingers don't completely close, and he has a weakened grip (18a).

The Columbus Hospital record discloses plaintiff sustained "fracture and dislocation, comminuted, extensive of right elbow involving olecranon, and upper shaft and coronoid process and head of upper shaft of radius" (17a). In addition, there is noted several small shaft fragments in the elbow, and irregularity of the head of the radius, and a posterior lateral dislocation at the elbow joint.

Dr. Mario F. Tagliagambe, the surgeon who operated for 3 hours to unsuccessfully reduce the fractures, testified that additionally "there were a lot of joint disruptions, both in ligaments and capsule form," a great deal of fluid in the elbow joint, and there was inserted permanently two screws and one circular wire (20a, 21a, 22a). After discussing the deformity with marked restriction, atrophy, "very little flexion and very little extension from this fixed position," with the failure of the operation to allow a maintenance of a proper position, the doctor concluded that the extremity is almost ankylosed by reason of bony block and soft tissue block, so that he has close to the 100 per cent level of permanent disability preventing him from ever returning to his work as a longshoreman, regardless of any arthrodesis operation that may subsequently be performed (22a, 23a, 24a).

Dr. David J. Graubard, another medical witness for the plaintiff, described plaintiff's condition and stated that at the time of trial, thirteen months since the accident, "there has been no union, no callus, and the thing has refused to heal," demonstrating "a complete destruction of the entire elbow joint with a loss of the head of the radius here (in-

dicating), and with the destruction of the ulna" (24a, 25a). He described the arm as "absolutely valueless" with "100 per cent loss of function of the entire right upper extremity —and this man is right-handed" (25a).

Though plaintiff had been examined by a Dr. Balensweig on behalf of the defendant, said doctor was not called to offer any medical testimony to contradict plaintiff's medical experts (28a). In fact, defendant's trial counsel admitted in summation that the plaintiff "did have a bad break," and that there is no serious dispute about the arm (28a, 29a).

In his computation of lost earnings on an extremely low basis of $1,400.00 a year (though plaintiff was earning between $75.00 to $100.00 a week at the time of the accident), an aspect of special damages alone, defendant's trial counsel came to the figure of $22,000.00 on the 3 per cent table (29a).

POINT I

As the record read in the light of findings favoring plaintiff discloses unseaworthiness and negligence proximately related to his severe and permanent injuries, comprising risks he did not assume and could not reasonably avoid, it follows that the verdict herein properly imposes liability on the shipowner-appellant.

There is ample and substantial evidence to support the jury's verdict and the decision by Honorable Clarence G. Galston that it be undisturbed.

The shipowner's obligation to provide a seaworthy vessel and a safe place for a longshoreman to proceed thereon to his place of work has been substantially breached in several major respects herein. First, the presence of grease on the passageway, caused by the frequency and manner of ap-

plying this substance to the winch drum and runners close to the place of the accident, and secondly, the failure to provide sufficient and adequate illumination in the area whereat this condition was caused and allowed to exist, compounded by an obscure three inch elevation across the passageway, have all been proven and were accepted as true by the finders of facts.

That plaintiff had used this passageway on prior occasions is no excuse for the shipowner's breach of its nondelegable and continuing duty to provide a seaworthy passageway for its business invitee. In *Troupe* v. *Chicago, Duluth Transit Co.*, 234 F. (2d) 253 (C. C. A. 2d, June 1, 1956), this learned Court held that an action for unseaworthiness and negligence might be resolved from a factual situation where a stewardess slipped on a worn and wet stairway, though she admitted "she had used the same and identical steps many times over six previous seasons and that she had safely negotiated them several times on the day of the accident."

As to the equal application of the warranty of seaworthiness to business invitees and seamen, which defendant disputes in its discussion of the meaning of *Socony-Vacuum Oil Co.* v. *Smith*, 305 U. S. 424, we need merely refer to the recent decisions of the United States Supreme Court in *Pope & Talbot* v. *Hawn*, 346 U. S. 406 and this Court in *Amador* v. *A/S J. Ludwig Mowinckels*, 224 F. (2d) 437.

The warranty was extended to a carpenter in the *Hawn* case, who fell through a hidden opening, and was explained in the majority decision as follows:

> "His need for protection from unseaworthiness was neither more nor less than that of the stevedores then working with him on the ship or of the seamen who had been or were about to go on a voyage. All were sub-

jected to the same danger. All were entitled to like treatment under law."

In the *Amador* case, this Court discussed the warranty applying to longshoremen as follows:

"Unless we have misunderstood the doctrine, the situation as to the ship's liability is precisely as though the crew had been discharging the strips."

This was held to be in accordance with the principle enunciated in *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, 66 S. Ct. 872, defined in *Amador* to mean that "longshoremen discharging a ship are in the same position vis-a-vis the ship as members of her crew • • • " (p. 440 of 224 F. (2d)).

As fundamental are the propositions that the absence of illumination, and the presence of a foreign and slippery substance, proximately related to injuries sustained by a longshoreman, necessarily invokes the warranty.

As regards illumination, see:

Brabazon v. *Belships Co.*, 202 F. (2d) 904;
Crawford v. *Pope & Talbot, Inc.*, 206 F. (2d) 784;
Mollica v. *Compania-Sud-Americana De Vapores*, 202 F. (2d) 25;
The Wearpool, 112 F. (2d) 245;
Foster v. *Moore-McCormack Lines*, 131 F. (2d) 907;
Lo Bue v. *U. S. A.*, 75 F. Supp. 154;
Osnovitz v. *U. S. A.*, 103 F. Supp. 238.

As regards a foreign substance on the deck, see:

Troupe v. *Chicago, Duluth Transit Co.*, *supra*;
Poignant v. *United States*, 225 F. (2d) 595;
Lauro v. *U. S. A.*, 162 F. (2d) 32, 34.

The law is also clear that a business invitee does not assume the risk of an unsafe place to work, even when apparent:

Socony-Vacuum Oil Co. v. *Smith, supra;*
Beadle v. *Spencer*, 298 U. S. 124;
Vanderlinden v. *Lorenzten*, 139 F. (2d) 995;
Grillea v. *U. S. A. et ano.*, 232 F. (2d) 919.

The foregoing cases hold that the shipowner's obligation to furnish a safe and seaworthy vessel is continuing and non-delegable, and prompts liability regardless of knowledge of the danger by the injured person.

If there be an alternative safe passageway, then the doctrine of comparative negligence is applied to reduce the recovery to the extent of such contribution. The facts in the instant case disclose that in fact there was no alternative *safe* passageway, and further, the trial Judge favored defendant by charging that the burden to prove freedom from contributory negligence would be on the plaintiff. (See page 7a of appellant's appendix to its brief.)

Defendant's hindsight attempt to blame plaintiff for not using the thwartship passageway, assumedly by proceeding on the port side past No. 3 hatch to the after side of the house, and then thwartships to the starboard side, and thence forward to the starboard aft portion of No. 2 hatch, ignores two obvious truths: 1. Once past the house on the starboard forward side, the discharge operations and attendant dangers were in effect at No. 2 hatch. Reasonable foreseeability dictated use of the port passageway, a safety measure admitted even by defendant's witness Purcell. 2. The route proposed by defendant was in fact not ever used by any of the longshoremen at any time during the two days the vessel was worked by them.

An extreme situation was presented to this Court in *Guerrini* v. *United States*, 167 F. (2d) 352, solely on the issue of negligence involving notice, and not unseaworthiness, when an employee of a sub-contractor hired to clean boilers slipped on a patch of grease. The Court considered that even though libelant "must have been either totally indifferent to any possibility of danger, or have paid no attention whatever to his footing" by choosing to stand on the patch of grease, he might nonetheless recover damages after a proper deduction for contributory negligence is made.

The instant case is quite different. Here, the issue of contributory negligence was presented to the jury, and its general verdict must be deemed to have encompassed any deduction that should have been made. Further, the state of facts here, as compared with *Guerrini, supra*, clearly shows that the contributory negligence of the plaintiff, if any, must be minimal indeed by reason of his reasonable use of the port passageway under circumstances where the starboard passageway presented obvious dangers attendant on cargo discharge.

Defendant errs in contending that the issue of contributory negligence predicated on a choice between an "obviously safe passageway" and one that is unsafe was not properly presented to the jury by the Charge below. The excerpt from said Charge, *supra*, sufficiently answers such contention.

The cases cited by defendant in its brief are not in point. They concern in the main the maritime law of several decades past, and situations on land and aboard ship where "obviously safe" alternate ways were provided.

In the 1932 case of *Holm* v. *Cities Service Transp. Co.*, 60 F. (2d) 721, concerning an action for negligence alone,

the Court recognized that "Though somewhat greasy decks were necessarily concomitant to loading, this did not do away with the duty of the defendant to use whatever care was required to prevent excessive accumulations of oil in places where they would be dangerous to a person rightfully using the deck" (p. 722 of 60 F. (2)). The reversal was predicated on the fact that plaintiff was free to choose between "what is safe and what is known to him to be dangerous," while off duty and going for a drink of water.

The rationale above runs through the cases cited by defendant in its brief, and has no application to the state of facts with which we are here concerned. Here the shipowner knew or should have known of the use of the port passageway by the hatch bosses during the two days of cargo discharge on the starboard side.

In the case of *Lynch* v. *United States*, 163 F. (2d) 97, an action in Admiralty consequent on the death of an electrician's helper who fell through an unlighted open hatch, the concurring opinion of L. Hand included the following:

> "If the course which Lynch actually took was one which the shipowner might have supposed an employee would take, and, if reasonable care would have detected the absence of the hatch cover, I should hold that liability was established" (p. 99 of 163 F. (2d)).

Where this principle did not apply to Lynch, it most certainly applies here. This is emphasized by the fact that unseaworthiness does not require notice, and that defendant's own supercargo clerk, Purcell, as well as the hatch bosses necessarily used the port passageway the entire day during cargo operations on the starboard side.

There is no need to further discuss the cases cited by defendant on the proposition it advances of an alternative

safe passageway when, in fact, the jury concluded there was no such alternative. Defendant misconceives and misstates the basic issue herein and ignores probative facts in the record that support the verdict, and seeks acceptance of its version on testimony that was resolved by the fact finding body in favor of the plaintiff.

POINT II

The trial judge necessarily and properly refused to disturb the verdict predicated on an uncontroverted permanent disability and grievous special and general damages flowing therefrom.

Defendant's Point II erroneously contends that the experienced trial Judge, Hon. Clarence G. Galston, refused to disturb the verdict because "the Court misconceived its power, and its correlative duty." Where the opinion states that the verdict would be set aside only if "it can be demonstrated that there was no substantial evidence to support the verdict," how can defendant argue on page 13 of its brief that this is error where the opinion clearly sets forth the basis of grievous injuries and permanent damages that substantially support the verdict?

It is axiomatic that a jury verdict is at least as unassailable on questions of fact involving damages as where the Court alone sits as a fact finder. The rule is expressed by the U. S. Supreme Court in *Lavender* v. *Kurn*, 327 U. S. 645, 653, as follows:

> "Only where there is complete absence of probative facts to support the conclusion reached does a reversible error appear."

In a recent decision by this Court in *Marino et ano.* v. *United States of America*, 234 F. (2) 317 (C. C. A. 2d,

June 6, 1956), concerning an appeal on alleged excessive damages awarded by a trial Judge, the *per curiam* opinion states as follows:

> "Had the award been made by a jury with an eye to equities, rather than upon the black and white of strict findings pro and con, probably no one would question the result. While the judge did not have that freedom, we think he has well buttressed his result in his meticulous opinion, and that the ends of justice will not be served by upsetting what he has done" (p. 318 of 234 F. (2)).

The opinion below, as well as the one incorporated by reference and found in defendant's appendix, clearly demonstrate that the Court below properly understood its power to exercise discretion, and in the exercise thereof refused to disturb the strongly substantiated verdict herein.

There is no need to repeat the injuries set forth under Statement of Facts in this brief. Defendant's trial counsel in summation conceded their seriousness, and in fact did not present any medical testimony to raise doubt, even if that would matter on appeal once such doubt had been resolved by the jury. The prospective lost earnings consequent on the injuries, as calculated by defendant's trial counsel on extremely low figures which he advanced as indicative of plaintiff's annual past earnings, ignoring his earnings in the recent past, would compel an opinion that the total verdict, which included damages for pain and suffering, humiliation, inability to ever again engage in normal activities of a man without the useless appendage, etc., was less than adequate.

This Court has held that it would not disregard a jury's verdict merely because the Court might have reached a different conclusion on the facts. *Hughes* v. *Lawyers Trust*

Company, 108 F. (2d) 792, cert. den. 310 U. S. 647, 60 S. Ct. 1097.

In accord:

Galeota v. *U. S. Gypsum Co.*, 123 F. (2d) 947, cert. den. 315 U. S. 813, 62 S. Ct. 798;
Davis v. *Schwartz*, 155 U. S. 631;
Barlow v. *Pan Atlantic S. S. Corp.*, 101 F. (2d) 697.

CONCLUSION

Defendant-Appellant asks this learned Court to again resolve a conflict on facts that has already been resolved by a proper body of jurors. An eminently experienced trial Judge has corroborated and refused to disturb their unanimous deliberations that were resolved into a properly grounded verdict.

As the evidence amply supports the jury's verdict, and there was no error in the Court's instructions to said jury, nor in his decision on defendant's motions, it is respectfully urged that the judgment herein be affirmed, with costs.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

For the Second Circuit

Pasquale Palermo,

Plaintiff-Appellee,

—against—

Luckenbach Steamship Company, Inc.,

Defendant-Appellant.

Excerpts From Testimony

—14—

• • • • •

Jerry Guarracino, having been first duly sworn, testified as follows:

Direct Examination by Mr. Klonsky:

Q. Mr. Guarracino, is that your name, sir? A. Yes, sir.

Q. Where do you live? A. 127 Second Avenue, New York.

Q. What do you do for a living when you work? A. Longshore.

Q. And by whom are you employed as a longshoreman? A. Turner & Blanchard.

• • • • •

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• • • • •

Q. Now, do you work for Turner & Blanchard at any particular pier? A. Yes, sir.

Q. What pier is that? A. Pier 135, foot of 35th Street.

Q. How long have you been a hatch foreman at that pier? A. About six years.

Q. And you have worked steadily for Turner & Blanchard? A. Yes, sir.

Q. And do you know whether or not Turner & Blanchard does the exclusive stevedoring work for the Luckenbach Steamship Company? A. Yes, sir.

• • • • • •

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• • • • • •

Q. How many gangs were in the No. 2 hatch on that day? A. Two gangs.

Q. In other words, you were the hatch foreman of the gang in No. 2 hatch forward? A. That is right.

Q. Who was the hatch foreman for the No. 2 hatch aft? A. This Pasquale Palermo.

• • • • • •

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• • • • • •

Q. Now, this vessel, do you recall which side she was moored to the pier? A. The starboard side.

• • • • • •

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Q. Now, as you walk along this passageway towards the No. 2 hatch on the port side, how close is the left side of your body to that winch drum that is seen in one of those pictures? A. How close?

Q. Yes. A. Oh, I would say a foot or so.

Q. About a foot or so? A. Yes.

Q. And how close is that winch drum to the sill? Do you

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know what that sill is, the raised area from the deck over which one has to step to go to the forward part, how far is

that winch drum from that sill? A. Well, that sill is in front of the winch.

Q. Yes? A. It is parallel with the end of the winch.

Q. It is the ending of the winch? A. That is right, in other words, it is the enclosure where they have got that winch.

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Q. Now, you say you left with your gang and all of the gangs at 6:00 p. m. for supper? A. That is correct.

Q. What time did you return? A. At 7:00 the whistle blows, at five minutes to 7:00, and they all start walking up on the ship.

Q. I see, now— A. In rotation.

Q. Did your men get on the ship before you? A. Yes, sir, they always do.

Q. In other word , you have some business to do on the dock with your dock men? A. All hatch bosses stay on the dock until the men go up on the ship.

Q. And is the discharge operation, is that taking place on the in-shore side into the dock? A. Yes, sir.

Q. In other words, the slings, the booms, the cables are all working the off-shore side—the in-shore side? A. They are working on the starboard side.

Q. They are working on the starboard side? A. That is correct, on the right side of the ship.

Q. So when you came on the ship after the men had started working in the discharging of the cargo, which side of the ship did you walk on to go to your hatch? A. On the left side, the port side.

Q. Why did you go to the port side instead of the starboard? A. It is safer to walk on the port side, because on

the starboard side the drafts are coming out of the different hatches.

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Q. And as you were walking forward, after having come up this ladder, port side, about how far behind you was Mr. Palermo? A. Oh, a few feet, I would say.

Q. Now, about what time would you say this was when you had reached the area where the accident happened? A. Well, I would say between about ten minutes after seven, five to ten minutes after seven. It takes us about five minutes or eight minutes to get up there.

Q. Were the men already working on the ship? A. Yes, they were already working.

Q. I see. Now, did you see the accident? A. No, sir.

Q. Did you hear when Mr. Palermo fell? A. Yes, sir.

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Q. Yes? A. Steps. We will say that is an iron ladder. Well, I am walking towards my end, the forward end, and Mr. Palermo is in the back of me. All of a sudden I heard like a thud and a moan. I looked back and Mr. Palermo is on the floor.

I said, "What is the matter with you, what happened?"

Q. All right. Now I show you Plaintiff's Exhibit 3 in evidence and give you a pen, and I ask you to put the word "P" for Palermo, as to where you saw him on the floor.

(The witness did as requested.)

A. He was half inside this here enclosure, his body was inside this enclosure (indicating).

Mr. Klonsky: May I show this to the jury without passing it to them?

The Court: Yes.

Mr. Klonsky: Here is where this letter "P" is (indicating).

Can you all see this?

The "P" stands for Palermo, and it is on the forward side of this sill (indicating).

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Q. Where, where were his feet? A. Aft.

Q. Towards the sill? A. That is right.

Q. And at 7:00 p. m. was the sun down or was it dark? A. Well, at that time of the year it is always dark.

Q. At 7:00 p. m.? A. Yes, at 7:00 p. m.

Q. Could you tell us what you observed about the lighting conditions at the place where Mr. Palermo fell? A. Well, at that particular time I didn't observe nothing, it was dark.

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Q. Now, I show you Plaintiff's Exhibit 3 in evidence where on the officers' quarters there is a bulb enclosed by some steel indicating a light fixture; do you see that? A. Yes.

Q. Was this on or was that off at the time this man fell? A. To my recollection it was off.

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Q. In daylight while you were there, before 6:00 p. m., did you observe the condition of the after part of this sill? A. What do you mean?

Q. The condition of the floor or deck? A. You mean—

Q. Do you know what I mean by the aft part of the sill, before you get to the sill, as you are walking towards your hatch, did you have occasion to observe the condition of the deck during the daylight hours? A. With reference to what, the walking conditions?

Q. Yes, where you were walking? A. Well, naturally there are spots of grease and oil because they always oil them winches.

Q. You mean it is right near the winches? A. All the time, naturally.

Q. Did you see spots of grease and oil there before 6:00 p. m. on that day? A. Well, to my recollection I think I did.

Q. And while you were on this ship, is that your best recollection? A. Yes, sir.

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Q. Who oils and greases the winches? A. Oh, they have a deck man.

Q. A member of the crew of that ship? A. Yes, a crewman.

Q. And they oil and grease the winches, do they? A. Yes.

Q. Longshoremen don't oil and grease those winches, do they? A. No, no, sir, they don't have no business whatsoever.

Jerry Guarracino—for Plaintiff—Cross

Q. Now, this sill that we have here in Plaintiff's Exhibit 3 in evidence, could you give us your best approximation as to how high it is above the deck? A. I would say about three inches.

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Q. Do any of these lights down the hatch or on top of the mast itself illuminate the hatch itself?

Mr. Underwood: I object to the form.
The Court: I sustain the objection.

Q. Could you tell us whether there was any illumination directed to this area where Mr. Palermo fell?

Mr. Underwood: Your Honor, I object to the form of the question. Let him ask him what he saw.
The Court: I overrule the objection.

A. As far as illumination, there was none, there were no lights directed at this particular spot.

Q. At the time that he fell, were you able to see the grease spots on the floor with your own eyes? A. No, sir.

Q. Why couldn't you see it then? A. How can I see if it is dark?

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Cross Examination by Mr. Underwood:

Q. When you came back at a little after seven, had your gang preceded you? A. Yes, sir.

Jerry Guarracino—for Plaintiff—Cross

Q. And had Mr. Palermo's gang preceded him? A. Yes, sir.

Q. How about the gangs that were working in No. 3 and No. 4; had they begun to work also? A. Yes, sir.

Q. And as you went forward on the port side of the ship, the ship was working, was being discharged, was she? A. That is correct, sir.

Q. And you went forward on the port side because of the drafts that were there? A. We always go on that side, that is a safety measure that we take.

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Q. Well then, you don't know which side they went up; is that right? A. As a rule we all go up on the port side. We never go towards the winches. Only when the winches are not working—

Q. Do you know— A. Some of the gangs—excuse me—some of the gangs that go up, the first gangs, when they get up they can go up on any side because there is no hatch working, so there is no chance of them getting hurt with a draft coming in or out. Do you get the point? A. Yes, I think I do, thank you.

Q. When you were walking across the forecastle deck after you got up the ladder, and until you came to the point where Mr. Palermo fell, there wasn't any danger of your being hit by a draft then, was there? A. No, sir.

Q. That would be true on the starboard side too, would it not, in that area alongside the officers' house, the drafts don't go there, do they? A. Not on top of the officers' deck, no.

Q. On neither side, port nor starboard. A. We don't go up there.

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Q. Isn't it quite possible, is it not, for a man who wants to do so, after climbing up that ladder to go across to the starboard side on that place called the passageway on Exhibit A? A. Is it possible? The two winchmen have to get out of the way. In other words, there is no room for anybody else to pass if these two men are working them winches.

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A. As a rule I see them oiling them winches because you have to oil them runners, otherwise they don't operate right.

Q. You didn't see anybody oiling them that day? A. Not that particular day.

Q. Or the day before? A. The day before I did.

Q. You had the previous day?

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You see, when these ships come in, these runners are all rusty from the sea voyage, and if you don't oil them they don't operate right, they catch.

Q. I want you to tell me, please, what you saw the man do when you saw him do it. A. Some of them, they have got—

Q. Not what some of them have, but what you saw this one.

You say you saw one the day before the accident? A. They have a pail with grease, oil, they call it.

They dip it, they dip it on—I would say it is like a mop only it ain't as big, it is about seven or eight inches—

Q. Like a sink mop? A. Something like that.

They dip into the pail and they run it across the drum.

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Q. I see. Where they put the oil, where the oil is, it is on that part of the runner that is on the drum? A. On the drum itself, that is correct, sir.

Q. Yes, yes. And did you see him do anything else? A. Well, they come around and they oil the different parts of the winches. They grease it, rather. They have got grease guns, and they grease the different mechanical parts of the winch. They have got to grease them all day long.

Q. Like you might use it on an automobile? A. That is correct, sir.

Q. Now, that grease is squirted by a gun on some bearings or something in the operating part of the winch? A. That is correct, sir.

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Q. Well, I am asking you to describe it in the best way you can.

Is it sort of medium thick and medium then? A. It is enough for them to fall off this mop that I was telling you about. You understand, they use it. In other words, they use it like you would use a paint.

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Q. Now, getting back to my earlier question, I would like to have you tell me, if you will, where these grease spots began. A. They are all around that deck, sir.

Q. Over the entire passageway from the after ladder to

the sill? A. There were some on one side there, they were all over there, I couldn't exactly say how deep it was, but there was grease spots on that deck.

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Q. Do you say that there was any light in the area where Mr. Palermo fell, the immediate area where he fell that was not burning? A. There was no light there, no, sir.

Q. Do you mean, well, when I use the word "light," now, I am talking about a light fixture, a gadget with a light bulb in it.

Do you say that there was a light fixture there that didn't have a light that was burning in it? A. That is correct, sir.

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Redirect Examination by Mr. Klonsky:

Q. And on the port winches, particularly the winch which

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was right near where Mr. Palermo fell, was that in use during the day? A. Positively, they were discharging cargo.

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ANIELLO SORRENTINO, having been first duly sworn, testified as follows:

Direct Examination by Mr. Klonsky:

Q. Mr. Sorrentino, sit down, please.

Where do you live, please? A. 1653 - 68th Street, Brooklyn.

Q. And what do you do for a living? A. Longshoreman.

Q. Now, on February 16, 1955, were you employed as a longshoreman by Turner & Blanchard? A. That is right.

Q. And who was your hatch boss? A. Patsy Palermo.

Q. Mr. Palermo? A. That is right.

Q. The plaintiff in this case? A. That is right.

Q. And were you working on the Marine Snapper on that day with his gang? A. Yes, sir.

Q. What was your job in the gang? A. I was the gangway man, the signal man.

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Q. Now, did you see the accident to Mr. Palermo on that day? A. No.

The Court: What?

The Witness: No.

Q. Were you on the other side of the ship; is that right? A. That is right.

Q. On this day, was it the first or the second day of work on this ship? A. The second day.

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Q. Now, did you go and look at the area where this accident happened afterwards? A. Not right away, but a few minutes after.

Q. You went to the place on the port side? A. That is right.

Q. What did you see there? A. At that time one of the men from the company came over and he asked me the question because that is routine—

Q. What did you see?

Mr. Underwood: Your Honor, I am trying to understand the last answer.

The Court: You will have to speak up and distinctly, we don't understand you.

Now read what he said.

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(Previous question and answer read.)

The Court: One of the men of the company, do you mean of the ship's company?

The Witness: From the ship company, yes.

The Court: He asked you something?

The Witness: Yes.

I went over on the other side and I show him the light was burned out, that particular light that you just said before.

Q. The light was burned out? A. I pointed to the light, that light was burned out, and I said, "The man falls over here, but I don't see him fall over here because Jerry went for his own business and I went back to my own business discharging the ship."

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Mr. Klonsky: All right, sir.

This entry comes from the rough deck log of the ship, and it is as of 2000, which we have stipulated means—

Mr. Underwood: 8:00 p.m.

Mr. Klonsky: 8:00 p.m.

"Timekeeper from Turner & Blanchard reports that about 1905"—

Mr. Underwood: 7:05.

Mr. Klonsky: (Continuing) —"Patsy Palermo,

—87—

hatch boss No. 2 after gang tripped and fell, injured right elbow and hand. Accident occurred on forecastle deck, port side. He tripped on treadle by bridge house. Inspected same. All clear on deck, no grease. Bulkhead lights out, two. Electrician replaced."

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PASQUALE PALERMO, having been first duly sworn, testified as follows:

Direct Examination by Mr. Klonsky:

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Mr. Palermo, when were you born and where were you born? A. I was born in Italy, August 19, 1911.

Q. So in 1955 you were about 44 years of age; is that right? A. 45.

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Q. And what were your earnings each week at the time this accident happened? A. From $75 to $100, $110.

Q. Between $75 and $100 a week? A. About that.

Q. Do you know what your hourly earnings were, about how much you got an hour? A. I think $2.25.

Q. $2.25? A. Yes.

Q. Did you get extra for overtime? A. Yes, sir.

Q. If you worked after 6:00 o'clock, did you get overtime? A. Yes, sir, it is almost $4 an hour for overtime.

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Q. Now, these lights that are permanently with the ship, do you know what I mean, on the walls of the ship— A. Yes, sir.

Q. Do the longshoremen have anything to do with replacing bulbs or seeing that those lights are running? A. No, sir.

Q. Who puts those lights on and who puts those lights off, do you know? A. The crew.

Q. The crew? A. Yes, the electrician.

Q. The longshoremen have anything to do with the permanent lights? A. No, sir.

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Q. Do you know how much time ahead of you they were? A. Well, it is about four or five minutes because I was talking with one man on the way up, one man who used to be down the hold, I was talking with this man while I was going up the gangway. Then I met Jerry on deck. I was

talking about the work, and then we went up to the No. 2 hatch.

Q. In other words, it was about four or five minutes before you came? A. Yes.

Q. And your gang had already gone on the ship from supper? A. Oh, yes, yes.

Q. And were some of these hatches already unloading at

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the time you were coming on the ship? A. Yes, sir.

Q. And they were unloading on the starboard side? A. On the starboard side, yes, sir.

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Q. When your foot or feet started slipping, will you please describe for the Court and jury how it felt to you? A. Something smooth, fast.

Q. I see. After the accident, did you have an opportunity to look at your shoes and your pants? A. Yes, in the doctor's office.

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Q. What did you see? A. It was soiled, I made it dirty, the floor there.

Q. What was on your shoes? A. Grease.

Q. Grease? A. Black.

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Q. In other words, the weight of your fall went on your right hand? A. Yes, the weight of the fall on the right hand.

Q. Are you a right-handed man ordinarily? A. Yes, sir.

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Q. Have you ever done any work since the day of this accident? A. No.

Q. That is since February of 1955? A. No, sir.

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Mr. Klonsky: I had just started reading the Columbus Hospital record with respect to Pasquale Palermo who was admitted to this hospital on February 17, 1955, at about 1 p.m., and discharged February 25th at 3:50 with the diagnosis of fracture and dislocation, comminuted, extensive of right elbow involving olecranon, and upper shaft and coronoid process and head of upper shaft of radius.

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"There is a markedly comminuted fracture of the right olecranon with some separation of the fragments. The fracture involves the main portion of the olecranon and the adjacent shaft of the ulna. There are also several small shaft fragments at the anterior aspect of the elbow which are apparently from the coronoid process. There is also irregularity of the head of the radius due to a compression fracture. In addition, there is posterior lateral dislocation at the elbow joint.

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Q. Since the accident and up to the present day, Mr. Palermo, how do you eat? A. With the left hand.

Q. Who cuts your meat and prepares your food for you? A. My son and my daughter and wife.

Q. They cut the meat for you? A. Yes.

Q. Who ties your tie for you in the morning? A. My daughter.

Q. Who dresses you? A. I dress roughly, I can dress—

Q. You can dress yourself roughly? A. Roughly, yes, sir.

Q. Well, when you dress, how do you get your pants on? A. Well, when I lift the pants, somebody is holding on this side (indicating).

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Q. Could you tell the Court and jury in your own words what you felt in this hand from the day you came to the hospital until the present day? Well, explain the feelings, that is important. A. It is pretty hard, it is sometimes painful, and sometimes you forget, you move the arm and because there is a screw inside—

Q. You have a screw in your elbow? A. Yes, so if I put it on the table like that, it hurts. It is a steady pain. If I lift my hand up like this, it feels heavy, I can't hold it up.

Q. How is your grip in your right hand, do you have any grip, any strength? Is it as strong as your left hand? A. The fingers no close over here (indicating):

Q. The fingers don't close all the way? A. Yes, sir.

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Q. Now, at the time the accident occurred, were there mast lights above the No. 2 hatch? A. Yes, sir.

Q. If you walked from the place where you fell to the mast where these lights were located, about how far was it? A. About a hundred feet.

Q. And if you went from the bottom of the mast up to where the lights were, how many feet would that be? A. Forty.

Q. About forty feet? A. Yes.

Q. Now, can you tell us which way these mast lights were directed? A. One directed straight down the hatch, the other one is on the starboard side.

Q. There are two mast lights there? A. Yes, sir.

Q. One was directed down the hold where the hold men were working, and the other to the starboard side where the gangway men and the dock was located? A. Yes, sir.

Q. Did any of that light come to the place where you fell? A. It was too far away.

Q. Was there any illumination at all where you were walking? A. No, sir.

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Cross Examination by Mr. Underwood:

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Q. And in this process of slipping and then tripping over the sill and falling, you only took one or two steps? A. Steps, yes, sir.

Q. So that you remember initially your first slip was within two or three feet of the sill; is that right? A. Yes, that is right.

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Q. You could pass on the starboard side? A. Well, it is almost against the rules to pass there while the ship was working.

Q. But you could pass on the starboard side? A. Yes, if I wanted to, yes.

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MARIO F. TAGLIAGAMBE, called as a witness on behalf of the plaintiff, having been duly sworn, testified as follows:

Direct Examination by Mr. Klonsky:

Q. Are you a regularly licensed medical practitioner in the State of New York? A. I am.

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Q. So both the ulna and the radius were involved in these fractures; is that right? A. That is correct.

Q. The two bones of the forearm? A. That is correct.

Q. And also the olecranon process itself, which is right here at the elbow joint? A. That is right.

Q. Is that right? A. Yes.

Q. Will you continue, Doctor? A. In addition, there was a posterior lateral dislocation at the elbow joint.

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A. That constitutes the essential part of the bone pathology. Of course, there were a lot of joint disruptions, both in ligaments and capsule form. At the elbow joint, there was a great deal of collection of fluid, within the elbow joint.

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Q. How much of an area was cut open, would you say,

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altogether? A. By meausurement I would say approximately eight or nine inches; I don't know exactly.

Q. You opened it up so that you could get to the bone? A. So you could expose the entire open joint.

Q. When you are doing that, you are cutting ligaments and muscles— A. Skin, subcutaneous fascia, muscles, ligament, capsule and so forth.

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Q. By that you mean the extensive number of fragments of bone? A. That is correct.

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The problem there was not only to put them back in place, but to maintain the proper position of the bones. It was hard to fix in a manner so that they would be stable and maintain them in position.

An attempt was made, however, to fix those bones in the proper position by means of wire and by means of screws.

Q. How much wire and how many screws did you put into that elbow? A. If my memory serves me right, there were two screws inserted and one circular wire. The head of the—no, that is all, sir, I remember extracting that.

Q. After you did that, after you inserted the screws and the wire, were they meant to be there permanently? A. Yes, sir.

Q. What did you do after that? A. After that we put a large anterio-posterior molded plaster splint.

Q. Didn't you stitch him up? A. Oh, yes, of course.

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Q. About how long did that operation take? A. It took approximately three hours, sir.

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Q. How long a period of time after that did you treat him for this disability? A. Well, the patient still hasn't been discharged from care. He comes in for checkups, he is still reporting.

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Q. Would you please describe the condition of his forearm, of the right upper extremity as of now? A. The operative scar is clean and well healed. There is residual deformity in the right elbow joint associated with marked restriction of motion at the elbow joint.

There is a weakness in the hand grasp.

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There are secondary atrophy or atrophitic changes noted both in the arm, the forearm and hand.

There is a certain type deformity more specifically known as a varus deformity.

That is about the essential condition now, sir.

Q. Doctor, you speak of a marked restriction in the elbow joint. When we talk about the elbow joint itself, this is that (indicating); is that right? A. That is right.

Q. To what extent is this restricted? A. Well, it was very markedly restricted and the deformity referred to was of a certain type which in this particular case is not in an optimum position.

There is very little flexion and very little extension from this fixed point (indicating).

Q. In other words, it is almost ankylosed; is that right? A. Yes, sir.

Q. In other words, as if he had one bone running all the way down without a joint? A. In a fashion, yes.

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Q. What has happened to the bone that you say has made it worse, have they become osteoporotic? A. Two things have happened: No. 1, the position that we attempted to maintain was not maintained, that is, as a result of the fixation attempted.

No. 2, in this case there were some myositic ossificans, changes, that is changes—some ossification has taken place in the muscles around the elbow joint as a result of the extensive injury and hemorrhages into that area which in itself can account for a great deal of this marked restriction that is present.

Q. I see. A. In other words, there is a combination of bony block and soft tissue block as the result of these pathological changes which have been described.

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Q. This arthrodesis you are talking about would require another operation where you would break the bones that are locking the elbow joint now, and replacing the bones in such a way so he could move his arm, but they would be immobile again for the rest of his life at that position; isn't that right? A. That is correct, sir.

Q. It would have a beneficent effect with respect to his necessities? A. That is correct.

Q. Will he ever be able to use this extremity, regardless of what operation you give him, to work manually? A. No.

Q. Will he be able to return to his work as a longshoreman where you have to climb ladders and handle things?

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A. No, sir.

Q. This disability is permanent? A. Yes, sir.

Q. And is it competently produced by an accident of falling forward right on that right hand? A. Yes, sir.

Q. And, Doctor, what percentage of that right upper extremity is affected by his condition? A. From an industrial point of view, he would have close to the 100 per cent level of industrial use—that is, loss of use of that upper extremity.

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DR. DAVID J. GRAUBARD, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct Examination by Mr. Klonsky:

Q. Dr. Graubard, you are a regularly licensed medical practitioner in the State of New York? A. Yes, sir.

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You will also note there is a screw that has gone through one of the bones to try to hold it into place, and there is also a wire which is this here (indicating), in which an attempt has been made to bring some of the fragments of the bones together, to hold them to heal, but in spite of all

of that, in this area, and this is some thirteen months since the accident, there has been no union, no callus, and the thing has refused to heal.

As a result, you have a complete destruction of the entire elbow joint with a loss of the head of the radius here

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(indicating), and with the destruction of the ulna. As you can see, it has not healed up, and there are still small fragments of bone that can be seen lying in the soft tissues, in the muscles of the arm.

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So, on the basis of my examination, the overall picture, includes the weakness in the wrist, the limitation of motion in the wrist which is due to the destruction of the muscles up in the elbow joint which results in the motor power in the wrist movement being decreased; furthermore, con-

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sidering the limitation of motion of the shoulder, well, the overall picture is that of 100 per cent loss of function of the entire right upper extremity—and this man is right-handed.

Q. Can he ever do any manual work or longshore work, in your opinion, Doctor? A. As he is now?

Q. Yes, as he is now. A. He can't use that arm, it is absolutely valueless.

• • • • •

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* * * * *

EDWARD J. PURCELL, a witness called on behalf of the defendant, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Underwood:

Q. Whom do you work for, Mr. Purcell? A. Luckenbach Steamship Company.

Q. What is the nature of your work? A. I am the ship's clerk when the ship is in port.

Q. You don't go to sea with it? A. No.

Q. Were you acting as super cargo clerk on the Marine Snapper in February of last year when Mr. Palermo was hurt? A. Yes, sir, I was.

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* * * * *

Cross Examination by Mr. Klonsky:

Now, you yourself took the port passageway, did you not, when you came to the ship on other occasions? A. I used it all day long.

Q. You use the port passageway because on the starboard side there are drafts, there are cables, and there is movement; isn't that correct? A. Yes.

Q. And it is safer to use the port side; isn't that right? A. I use the port side, sometimes I have to use the starboard side.

Q. But if you don't have to use the starboard side, it is safer to use the port side; am I right or wrong? A. Yes.

Q. And to use the port side to get to the No. 2 hatch,

was there any other way than this passageway that this plaintiff could have taken? A. Yes.

• • • • •

—300—

ANDREW CERASE, called on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination by Mr. Underwood:

Q. Are you the man they call Shorty? A. That is right.

Q. May I call you that? A. It is o. k.

Q. You work for Turner & Blanchard? A. Yes, sir.

Q. And what kind of work do you do? A. I am assistant foreman—head foreman of the ship.

Q. Where do you work principally? A. Pier, foot of Thirty-fifth Street.

Q. That's the Luckenbach pier? A. Yes.

• • • • •

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• • • • •

Cross Examination by Mr. Klonsky:

Q. How often during the day does a man go around oiling and greasing up these winches? A. Maybe one or two times a day, but at least once. Maybe once, sometimes two times.

• • • • •

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• • • • •

Q. But did you see them the day before grease the runners? A. Yes.

Q. How do they do that? A. Put a little oil and—

Q. Black grease? A. I don't know what the call it. It is oil. You call it, it is just grease.

Q. Did they take a little brush and a pail and they put it on like they were painting something? A. Yes, but not too much. They put it on.

Q. But you don't know how much they put on number 2, do you? A. I see them put a couple of brushes, that's all.

Q. A couple of brushes? A. That is right.

• • • • •

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• • • • •

Mr. Klonsky: Your Honor, we may save time by agreeing to this: That the plaintiff, Mr. Palermo, had been sent for a physical examination by a doctor of his own choice, a Dr. Irwin Balensweig, and the examination took place on behalf of the defendant on March 2, 1966. Dr. Balensweig has not been called by the defendant. That's why I would like the record to show that he was examined on behalf of the defendant. Is that right? Here is the report.

Mr. Underwood: If you will also stipulate that plaintiff was examined by two additional doctors on behalf of himself or Mr. Di Costanzo or the Traveler's Insurance Company.

• • • • •

SUMMATION OF EUGENE UNDERWOOD

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• • • • •

There isn't any doubt that Mr. Palermo has a bad arm today. It is an unfortunate occurrence, but he did have a bad break. Of course, that is the reason

Extracts from Summation of Eugene Underwood

I didn't call my doctor because there is no serious dispute about the man's arm, but it isn't useless.

• • • • •

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• • • • •

I have done the figuring on the basis of table age 44 at 4 per cent and at 5 per cent, and if you take his earnings at $1,400 a year at 4 per cent, the present value of that much money would be about $20,000; and at 5 per cent, about $18,000. If you take it at 3 per cent, it would be about $22,000.

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JOHN T. FEY, Clerk

United States Court of Appeals

For the Second Circuit

October Term, 1956

No. 350

PASQUALE PALERMO,
Plaintiff-Appellee,

against

LUCKENBACH STEAMSHIP COMPANY, INC.,
Defendant-Appellant.

BRIEF AND APPENDIX FOR DEFENDANT-APPELLANT

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United States Court of Appeals

For the Second Circuit

October Term, 1956

No.

PASQUALE PALERMO,

Plaintiff-Appellee,

against

LUCKENBACH STEAMSHIP COMPANY, INC.,

Defendant-Appellant.

BRIEF FOR DEFENDANT-APPELLANT

Defendant appeals from a judgment of the Federal Court for Eastern New York entered on May 8, 1956 upon a jury verdict before Galston, J., awarding plaintiff $65,000 damages for personal injuries sustained on February 16, 1955 while he was working as a longshoreman on defendant's steamship MARINE SNAPPER. The Court's charge and its opinion denying defendant's motions after trial are printed in the Appendix hereto. In this brief references to the Appendix are prefixed with A and references to the record with R.

Facts

On February 15 and 16, 1955 plaintiff, employed by Turner & Blanchard, Inc., was in charge of a gang of longshoremen discharging cargo from No. 2 hold of defendant's steamship MARINE SNAPPER, which lay starboard side to the 35th Street Pier, Brooklyn. Plaintiff claims that

shortly after 7:00 p. m. on February 16, while he was walking forward in the port passageway between the deck house and the ship's side to resume work after supper, he slipped in grease which he did not see because the adjacent bulkhead lights were not lit. Defendant's witnesses testified that there was no grease on the deck, that the bulkhead lights were lit, and that even if the bulkhead lights had not been lit, floodlights on the mast gave adequate illumination.

Plaintiff fell and broke his right elbow. He admitted that he knew before he used it that the passageway was dark and infested with grease spots but "just didn't think" (R 152). He testified that he had seen the grease spots in the passageway earlier that day and on the previous day (R 99, 146) and that he had noticed when he went ashore for supper about an hour before he fell that the bulkhead lights were out and the passageway was dark (R 147-8, 150).

The MARINE SNAPPER, a C-4 cargo vessel, has a raised forecastle deck on which the forward deck house and Nos. 1 and 2 hatches are located. There is a passageway on the starboard side of the deck house similar to the port side passageway plaintiff used. There is also a thwartships passageway across the after side of the deck house which connects the two fore and aft passageways. There was no claim that either the thwartships or the starboard passageway was unsafe. The testimony of Purcell, defendant's supercargo clerk, that the starboard passageway was not unsafe (R 294-5) went unchallenged. Plaintiff testified that he had used the starboard passageway before and could have used it again (R 146-7). Plaintiff's witness, Sorrentino, testified that he always used the starboard passageway (R 85).

Exhibits 1, A, B and H show the area and the passageways. Copies will be handed up at the argument.

Motions, the Charge, etc.

At the close of the evidence appellant moved to dismiss the complaint and for a directed verdict. The motion was denied (R 487). Appellant requested the Court to charge that if the jury found that there was a safe passageway on the starboard side which plaintiff could have used, and that he knew of it but voluntarily chose to use the port passageway, he could not recover (A 10a). The request was denied and appellant duly excepted (R 502).

The jury returned a plaintiff's verdict for $65,000. Appellant duly moved to set aside the verdict, and for judgment notwithstanding the verdict or, in the alternative, for a new trial on the grounds, among others, that the verdict was contrary to law in that appellant had provided a safe route known to plaintiff, and on the ground that the verdict was excessive, particularly in light of plaintiff's flagrant negligence (R 540-2).

In a brief opinion (A 11a-12a) the Court said that the motion to set aside the verdict and for judgment notwithstanding the verdict "must be denied on the ground that there was before the jury proof sufficient to support the allegations of the complaint."

Dealing with the motion to set aside for excessiveness the Court felt that "the jury may have been overgenerous" and admitted that the amount of the verdict "gave me some concern." However, the Court concluded that a Federal Judge cannot set aside a motion for excessiveness "unless it can be demonstrated that there was no substantial evidence to support the verdict."

Appellant argued that, in dealing with the question of excessiveness, the Court must consider whether the jury made any, or adequate, allowance for plaintiff's obvious negligence. Here again, however, the Court felt that it was powerless, saying:

"Nor since the verdict was a general verdict can one speculate as to what part if any the defense of contributory negligence played in the determination of the jury."

The Appeal

This appeal raises two questions:

1. Can the plaintiff recover where he voluntarily chose to use a passageway known to him to be unsafe when there was an available safe passageway known to him?

2. Did the Court have power to consider the motion to set aside the verdict and for a new trial on the ground of excessiveness; if so, should it have considered the jury's allowance for contributory negligence?

POINTS

I. The Court erred in failing to direct a verdict for appellant and in failing to enter judgment notwithstanding the verdict.

There is no question of fact on this point. On direct examination plaintiff admitted that he knew that the passageway he used was "all spotted and greasy." He testified (R 99):

"Q. Now, during this day and the day before when you were on the ship, did you walk in that passageway on the port side where you had your accident? A. Yes, sir.

Q. I am talking about the daylight hours. A. Yes, sir.

Q. Will you tell the Court and jury what you observed about the deck in the area of that winch and the passageway when you walked just before you fell? A. Well, it was all spotted and greasy—

Q. You knew it was there? A. Yes, sir."

On cross-examination he testified (R 143):

"Q. You had worked on the ship the previous day? A. Yes.

Q. You had worked on the ship that day, too? A. Yes, sir.

Q. And you had worked all that day? A. Yes, sir.

Q. How many times did you say you had gone back and forth over that same area? A. About a dozen times.

Q. Was there always grease there? A. Yes.

Q. Always, every time? A. All the time.

• • •

Q. These grease patches were all over the deck in the area of the winch drums; is that what you say? A. Yes, that particular spot, yes.

Q. You knew they were there? A. Yes.

Q. They had been there all that day and all the previous day? A. Yes, sir" (R 146).

He likewise admitted that he knew that the lights were out and the passageway was dark. He testified (R 147-8):

"Q. Now, when you went off for your lunch at six o'clock was it dark yet; do you remember? A. Yes.

Q. Did you go back by the port side? A. Yes, sir.

Q. In the same passageway that you fell? A. Yes, sir.

Q. And what was the situation as to light at that time? A. It was completely dark.

Q. Just completely dark? A. Yes.

• • •

Q. Had you noticed at any time before that those lights were out? A. Yes, sir.

Q. When? A. It was about before I went, six o'clock.

Q. When you went out to lunch at six o'clock you noticed then that both of those lights were not burning? A. That is right, and I told the mate about it.

Q. To whom did you tell about it? A. One of them mates that was on deck" (R 150).

Indeed, he admitted that when he came back after supper he knew both that the passageway was greasy and that the lights were out but "just didn't think" (R 152).

> "Q. So that when you came back after your lunch, you knew that this passageway had grease on it? A. Yes.
>
> Q. And you knew that the lights were out? A. Yes.
>
> Q. And nevertheless you walked along there; is that right? A. Yes, I pass by and I never think for the minute that grease on the floor because your mind on the job.
>
> Q. Did you think and decide to take a chance or— A. No.
>
> Q. You just didn't think? A. Yes, I not think at all."

There is no doubt that he could have used the thwartships passageway on the after side of the deck house and gone forward along the starboard side passageway to No. 2 hatch and by so doing could have avoided the port side passageway known to him to be greasy and unlighted. Although with reluctance, he admitted he could have used the starboard side passageway. He testified (R 146-7):

> "Q. Did you ever use the starboard side? A. Well, once in a while, if I was forced to pass on the other side.
>
> Q. You say if you were forced to pass on the other side? I didn't hear you. A. Well, maybe once a day.
>
> Q. You could pass on the starboard side? A. Well, it is almost against the rules to pass there while the ship was working.
>
> Q. But you could pass on the starboard side? A. Yes, if I wanted to, yes."

Sorrentino, one of plaintiff's witnesses, and whose hatch boss plaintiff was (R 82), testified on direct examination that he never used the port side (R 85):

"Q. Now, Mr. Sorrentino, during the course of that day— A. Yes.

Q. —did you go on the port side at any time? A. No, I got no business to go on that side.

Q. You never there at all? A. No.

Q. So then you never went there so you don't know the condition of that side? A. Not on that side."

He had used the starboard side when he left the ship for supper at 6 p. m. (R 88).

Guarracino, who was also a hatch boss in No. 2 hatch (R 17), admitted, albeit reluctantly, that the thwartships passage was adequate for a man to pass from the port side to the starboard side (R 41-2, 45-6). The passageway clearly appears on the photograph, Exhibit A. By actual measurement it is three feet wide (R 343).

On these facts it is plain that appellant breached no duty to Palermo. Appellant provided him with a safe route to his work, *i.e.*, the starboard passageway, and Palermo knew it but chose not to use it. Since there was no breach of duty the Court erred in failing to grant appellant's motion for a directed verdict, in failing to charge the substance of appellant's request No. 12 (A 10a), to which appellant duly excepted (R 502), and in failing to grant the motion for judgment notwithstanding the verdict.

In *Hardie* v. *New York Harbor Drydock Corporation*, 9 F. 2d 545 (2 Cir.) [1925], a ship repairer fell through a hatch in an unlighted corridor. This Court held that the plaintiff knew, or was chargeable with knowledge, of the dangerous condition and could make no recovery because, there being an alternate, safe route available, his own negligence was the sole proximate cause.

In *Long* v. *Silver Line Ltd.*, 48 F. 2d 15 (2 Cir.) [1931], a ship repairer fell into a tank because the passageway he chose was unlighted. This Court held that there was

no liability because a light way was provided and plaintiff knew it. Citing *Hardie* this Court said:

> "There is no duty to keep a dark way safe if a light way is provided" (p. 16).

In *Holm* v. *Cities Service Transp. Co.*, 60 F. 2d 721 (2 Cir.) [1932], Holm, a seaman off duty, was returning to his room after going for a drink of water. Crossing the well deck, which he knew was greasy, he slipped and fell. He could have returned via the flying bridge which was safe. This Court reversed a judgment for Holm on the ground that his own negligence was the sole cause of his injuries.

In *Johnson* v. *United States*, 74 F. 2d 703 (2 Cir.) [1935], a seaman, off duty and on his way aft to the mess room for supper, walked across the open well deck instead of going below and using the shaft alley. This Court reversed a decree allowing recovery for his death on the ground that there is no liability where a seaman chooses a hazardous way when a safe one is available.

In *Tampa Interocean S.S. Co.* v. *Jorgensen*, 93 F. 2d 927 (5 Cir.) [1938], *certiorari* denied 304 U. S. 566, the Court held in a seaman's case that the following instruction to the jury was proper:

> "You are instructed that if the plaintiff was furnished two methods of entering the 'tween deck space, one obviously safe and the other obviously unsafe, and *if the plaintiff knew the safe method* and notwithstanding chose the unsafe method the defendant is not liable" (p. 930).

Even where there is a likelihood that longshoremen will take the unsafe way rather than the known, safe way the shipowner's only duty is to warn of the danger and where, as here, the injured man already knows the danger, there is no duty to warn and there can be no recovery. *Long* v. *Silver Line Ltd., supra*, 48 F. 2d 15 (2 Cir.). See also

the concurring opinion of L. Hand, C. J., in *Lynch* v. *United States*, 163 F. 2d 97, 99 [1947].

While the Court gave no reason for denying appellant's motions, or for failing to charge No. 12 as requested, plaintiff opposed appellant on these points by arguing that assumption of risk is no defense, relying on *Socony-Vacuum Company* v. *Smith*, 305 U. S. 424 [1939]. But that argument is only an evasion by semantics. The defense was, and is, that, on admitted facts, appellant did not breach its duty to provide plaintiff with a safe place to work, or to reach his work. Nevertheless, in view of plaintiff's attempt to equate the defense that no duty was breached with the doctrine of assumption of risk, a discussion of *Socony-Vacuum* is necessary.

In that case, Smith, a seaman, was injured when, while on duty, he fell from a defective step on which he was standing to enable him to reach an engine bearing he was required to feel periodically. There was evidence that he could have reached the bearing without using the step. The defense was that he chose to use an unsafe appliance when a safe one was available. The Supreme Court stated the question before it as follows:

> "The question is whether assumption of risk is a defense in a suit brought by a seaman under the Jones Act to recover for injuries resulting from his use, while on duty, of a defective appliance of the ship, when he chose to use the unsafe appliance instead of a safe method of doing his work, which was known to him" (pp. 424-5).

After citing this Court's decisions in *Hardie, Johnson* and *Holm, supra,* and after referring, seemingly with approval, to the charge upheld by the Fifth Circuit in *Jorgensen, supra,* the Supreme Court pointed out that Smith was a sailor actually on duty while the vessel was under way at sea, and looked "to the reason of the admiralty rule of assumption of risk in order to ascertain its appropriate

limits" (p. 430). The Court then pointed out the considerations which led it ultimately to conclude that the admiralty defense of assumption of risk is not available against a sailor actually on duty at sea. The Court said:

> "Many considerations which apply to the liability of a vessel or its owner to a seaman for the failure to provide safe appliances and a safe place to work are absent or are of little weight in the circumstances which attend shore employment, in relation to which the common law rules of assumption of risk and contributory negligence have been developed.
>
> The seaman, while on his vessel, is subject to the rigorous discipline of the sea and has little opportunity to appeal to the protection from abuse of power which the law makes readily available to the landsman. His complaints to superior officers of unsafe working conditions not infrequently provoke harsh treatment. He cannot leave the vessel while at sea. Abandonment of it in port before his discharge, to avoid unnecessary dangers of employment, exposes him to the risk of loss of pay and to the penalties for desertion. In the performance of duty he is often under the necessity of making quick decisions with little opportunity or capacity to appraise the relative safety of alternative courses of action. Withal, seamen are the wards of the admiralty, whose traditional policy it has been to avoid, within reasonable limits, the application of rules of the common law which would affect them harshly because of the special circumstances attending their calling. The Arizona v. Anelich, supra, 123, and cases cited; Calmar Steamship Corp. v. Taylor, 303 U. S. 525. It is for this reason that remedial legislation for the benefit and protection of seamen has been liberally construed to attain that end. Chelentis v. Luckenbach S.S. Co., 247 U. S. 372, 380, 381; Jamison v. Encarnacion, 281 U. S. 635, 639; Alpha S.S. Corp. v. Cain, 281 U. S. 642; Cortes v. Baltimore Insular Line, 287 U. S. 367, 375; Warner v. Goltra, 293 U. S. 155, 157" (pp. 430-1).

The Court expressly limited its holding to seamen on duty, reserving other questions for future cases (p. 433). Obviously the narrow decision was not intended to apply to longshoremen. This is established by the reasons given for the Court's conclusion expressed in the quotation above.

"The seaman, while on his vessel, is subject to the rigorous discipline of the sea • • •." This is not true of a longshoreman.

The seaman "• • • has little opportunity to appeal to the protection from abuse of power which the law makes readily available to the landsman." This is not true of a longshoreman.

"His complaints to superior officers of unsafe working conditions not infrequently provoke harsh treatment." This is not true of a longshoreman.

"He can not leave the vessel • • •." This is not true of a longshoreman.

"Abandonment of it in port before his discharge, to avoid unnecessary dangers of employment, exposes him to the risk of loss of pay and to the penalties for desertion." This is not true of a longshoreman.

"In the performance of duty he is often under the necessity of making quick decisions with little opportunity or capacity to appraise the relative safety of alternative courses of action." This is not true of a longshoreman.

"Withal, seamen are the wards of the admiralty • • •." This is not true of a longshoreman.

The cases decided since *Socony-Vacuum* are significant. In *Wong Bar* v. *Suburban Petroleum Transport, Inc.*, 119 F. 2d 745 (2 Cir.) [1941], a seaman, having been given liberty, was on his way ashore. To get there he had to climb a ladder from the stern of his vessel to a barge. Two ladders were available, a long one adequate in itself and

a short one adequate if properly held. Wong Bar elected to use the short ladder and relied upon Seabrook, a fellow seaman, to hold it for him. Seabrook let go, the ladder slipped and Wong Bar fell and was injured. The defense was that, an adequate ladder being available, Wong Bar assumed the risk of using the short ladder. This defense was sustained by the District Court. This Court held that Wong Bar's choice was a proper one because the short ladder properly held was as safe as the long ladder and reversed on the ground of Seabrook's negligence in failing to hold the short ladder properly. In dealing with the question, however, this Court pointed out that *Socony-Vacuum* was expressly limited to the situation where the seaman is on duty and reaffirmed its view in *Holm* and *Hardie* which involved injuries to men not on duty.

In *Bohannon* v. *United States*, 92 F. Supp. 700 (S. D. N. Y.) [1950], Leibell, J., affirmed on the opinion below, 185 F. 2d 678 (2 Cir.) [1951], a seaman, on duty at sea, chose to walk across the forward well deck which was unsafe instead of using an elevated catwalk which was safe. Relying upon this Court's decisions in *Holm* and *Johnson*, and pointing out that *Johnson* was cited with approval by the Supreme Court in *Socony-Vacuum*, Leibell, J., held that Bohannon's injuries were due solely to his own recklessness in choosing the dangerous way when a safe way was available to him.

In *Vielski* v. *Pacific-Atlantic S.S. Co.*, 163 F. 2d 553 (9 Cir.) [1947], a seaman on duty stood on an unsafe handrail to reach and repair a relief valve instead of using an available safe staging. The Court distinguished *Socony-Vacuum* and affirmed a decree dismissing Vielski's libel.

In *Grenawalt* v. *South African Marine Corporation*, 130 F. Supp. 432 (S. D. N. Y.) [1955], the decedent, a stevedore, was killed when he fell into a hold while working in an unsafe place although safe places were available to him. Citing *Hardie*, Weinfeld, J., dismissed the complaint.

In *Manera* v. *United States*, 124 F. Supp. 226 (E. D. N. Y.) [1954], a ship repairer was injured when he fell while using an unsafe method of descending to the ship's tanks instead of a safe available ladder. Citing *Hardie*, Byers, J., dismissed the libel, saying that the law

> "• • • visits upon grown men a certain responsibility in selecting a method or means to accomplish a purpose when the choice between a safe and a questionable one is more important to them than to anyone else" (p. 233).

Apart from broader considerations, we respectfully submit that the Courts should be, and are, reluctant to allow any recovery to a man whose injuries resulted, on final analysis, solely from his own neglect to take the most elementary precautions for his own safety.

II. The Court erred in holding that it could not consider the motion for a new trial on the ground of excessiveness of verdict.

On its motions after trial appellant asked the Court to grant a new trial for excessiveness of the verdict unless plaintiff would accept a remittitur to $20,000. Although the Court said that "the amount of the verdict" "gave me some concern" and felt that "the jury may have been overgenerous", it concluded that it was powerless to act "unless it can be demonstrated that there was no substantial evidence to support the verdict" (Opinion, A 11a-12a). Obviously this is not the prerequisite for consideration of a motion to set aside for excessiveness because, if a defendant could establish "that there was no substantial evidence to support the verdict," it would be entitled to a judgment dismissing the complaint. Plainly the Court misconceived its power, and its correlative duty. In *Comiskey* v. *The Pennsylvania Railroad Company*, 228 F. 2d 687 (2 Cir.) [1956], this Court made it clear that the District Court

has both right and duty to condition a denial of a motion for a new trial upon a remittitur where the verdict is excessive, even though there is sufficient evidence to support the verdict. This Court said that

> "The matter of excessive damages is primarily within the discretion of the trial judge * * * though we may review his decision for abuse of discretion * * *.
>
> "Thus it appears from the record that Judge Noonan, through error as to the extent of his authority, failed to exercise his discretion to condition denial of a motion for a new trial upon remission of part of the verdict. While we do not decide how such discretion should be exercised, we find that its exercise is an important right, of which defendant may not be deprived" (p. 688).

Precisely the same situation exists here. Considering itself powerless to do so, the Court failed to exercise its discretion and the matter should be remanded for the exercise of that discretion, as in *Comiskey*.

Contributory Negligence

The Court also erred in deeming itself powerless to consider whether the jury made proper allowance for contributory negligence. The Court said:

> "Nor since the verdict was a general verdict can one speculate as to what part if any the defense of contributory negligence played in the determination of the jury" (Opinion, A 12a).

This holding is directly contrary to that in *Herring* v. *Luckenbach S.S. Co., Inc.*, 137 F. 2d 598 (2 Cir.) [1943], where this Court affirmed the power of the trial court to consider whether proper allowance has been made for contributory negligence and, if not, grant a remittitur. Plainly that is so. As the Supreme Court said in *Socony-Vacuum* v. *Smith, supra*, 305 U. S. 424:

> "The power of the trial judge to guide and instruct the jury and his control over excessive verdicts afford as adequate a protection to owners as in any other case where the negligence of the seaman, whatever its degree, has contributed to an actionable injury" (pp. 432-3).

Against the background of that case, where the Court held, in the case of a sailor on duty, that the effect of contributory negligence was an apportionment of the damages rather than a dismissal of his claim, the reference to the Court's "control over excessive verdicts" must necessarily have included control over inadequate reductions because of contributory negligence. Otherwise the "adequate [a] protection to owners" to which the Court refers would be nonexistent and juries, after listening to the best of instructions concerning the effect of contributory negligence, could award defendants' money unrestrained. See also *Union Pacific R.R. Co.* v. *Hadley*, 246 U. S. 330 [1918], and *Pennsylvania Company* v. *Sheeley*, 221 Fed. 901 (6 Cir.) [1915].

The need for scrutiny of the jury's appraisal of plaintiff's contributory negligence was particularly pressing in this case because of the generality of the charge. The Judge charged only this:

> "Now, in determining liability, there can be no liability imposed on the defendant unless the plaintiff has established to your satisfaction the essential allegations of his complaint. If you find that the plaintiff has done that, then you approach another subdivision of the matter of liability, and that is whether the plaintiff was guilty of contributory negligence.
>
> The defendant says he was. Of course, the burden is on the plaintiff to show that he was free from contributory negligence. As I recall, the plaintiff said that he had gone over this passageway before and that he had noted the grease-spots. Knowing that, should he have been more careful on his return than he was?

> The defendant urges that if the plaintiff knew there were grease spots on the port side in the passageway leading to Hatch 3, why, he should have used the starboard; to which the plaintiff responds that that would not have been a wise move because the unloading was in progress to the shore, the winches were in operation and that the unobstructed passageway was on the port side" (A 7a).

This gave the jury no real guidance. It did not tell the jury that plaintiff had a duty to use reasonable care or to use that degree of care which a reasonably prudent man would use under the circumstances. It did not tell the jury that, in deciding whether or not plaintiff was guilty of contributory negligence, they should keep in mind that he was an experienced longshoreman and had a duty to use his special experience and knowledge to avoid injuring himself. Appellant had asked for such a charge by its request No. 8 (A 10a). The Court refused the request and appellant duly excepted (R 502). The request was proper and the Court erred in failing to charge its substance. *Walker* v. *Lykes Bros. S.S. Co., Inc.*, 193 F. 2d 772 (2 Cir.) [1952]; *Phillips Petrol. Co.* v. *Gibson*, 232 F. 2d 13 (5 Cir.) [1956]; *Cleveland Cliffs Iron Co.* v. *Metzner*, 150 F. 2d 206 (6 Cir.) [1945].

It is, of course, undeniable that Palermo was grossly negligent. He knew the deck was greasy and he knew it was pitch dark before he started to walk along the passageway. This is negligence as a matter of law. *Stoffel* v. *New York, N. H. & H. R. Co.*, 205 F. 2d 411 (2 Cir.) [1953], and cases cited at page 412.

In *Bohannon* v. *United States, supra*, 92 F. Supp. 700 [1950], Leibell, J., characterized as "reckless" a seaman's walking across an unsafe deck when a safe catwalk was available and this Court affirmed on Leibell, J.'s opinion, 185 F. 2d 678 (2 Cir.) [1951]. See also *McLean* v. *Studebaker Brothers Co.*, 221 N. Y. 475 [1917], and *Cosby* v. *City of Rochester*, 1 N. Y. 2d 396 [1956]. The rule was applied

to an infant 13½ years old in *Fox* v. *Mission of the Immaculate Virgin*, 309 N. Y. 812 [1955]. An experienced longshoreman should be held to at least the same standard of care.

Excessiveness

Plaintiff was born in Italy in 1911 (R 90) and had nine years schooling before he came to this county in 1929 (R 91). Since then he has always done manual labor (R 112-3). Although he is righthanded (R 105) he can still write and can drive a car (R 240). At the time of trial, his life expectancy, as distinguished from his work expectancy, was 26 years (R 199).

Plaintiff had been employed as a hatch boss by Turner & Blanchard for about six months prior to the accident (R 92) but not steadily (Exhibit 6) for his was an "extra" gang (R 124). Before that he had been unemployed (R 115). He averaged $70-$80 a week during the 6-8 weeks immediately preceding the accident (R 128). His total earnings as a longshoreman during the four years 1950-1954 were $4,744.03 (Exhibit 6), *i.e.* less than $1,200 per annum. During that time he also worked at some times but not regularly as a shipping clerk at $47-$60 a week and as a stockman at $52-$57 a week (R 118-120).

In October, 1944 he suffered a fractured dislocation of his right shoulder (R 381-2) which incapacitated him for about a year (R 120) and, in the opinion of the doctor who examined him 20 months after that injury, resulted in a 35% permanent loss of function of the right shoulder and a 30% loss of use of the entire right upper extremity due to associated weakness of the elbow and loss of grip (R 382-4). Following injuries to his right elbow in 1952, plaintiff complained of pain radiating down his forearm with occasional swelling of his right hand (R 404).

Plaintiff was not admitted to the hospital until 18 hours after he fell on defendant's ship. The admission diagnosis

showed a markedly comminuted fracture of the right elbow. A satisfactory open reduction was made and plaintiff's post-operative course was uneventful. His general condition on discharge eight days later was satisfactory (R 110). He was ambulant when seen at home the next day (R 258). Although plaintiff's doctor testified that in its present condition his right arm is virtually useless from an industrial standpoint (R 184), a few months after plaintiff left the hospital the doctor had recommended an arthrodesis which plaintiff refused (R 182-3, 187). The arthrodesis would allow substantial use of the right upper extremity without pain (R 182-3, 190-1) and plaintiff would be employable (R 229-230).

Even if plaintiff had not been at all negligent, the $65,000 verdict would be excessive.

CONCLUSION

The judgment appealed from should be reversed and the complaint dismissed, with costs, or, in the alternative, the case should be remanded for consideration of appellant's motion to set aside the verdict and grant a new trial on the ground of excessiveness.

Dated: New York, N. Y.,
September 24, 1956.

BURLINGHAM, HUPPER & KENNEDY,
Attorneys for Defendant-Appellant.

EUGENE UNDERWOOD,
WILLIAM M. KIMBALL,
Of Counsel.

United States Court of Appeals

For the Second Circuit

October Term, 1956

No.

PASQUALE PALERMO,

Plaintiff-Appellee,

against

LUCKENBACH STEAMSHIP COMPANY, INC.,

Defendant-Appellant.

Docket Entries

1955

Mar. 16—Complaint filed. Summons issued.

Apr. 11—Answer filed.

Apr. 12—Note of Issue Filed.

June 2—Notice of taking deposition filed.

1956

Jan. 24—Notice of Taking Deposition Filed.

Feb. 20—Abruzzo, J. Motion for preference Granted for the April 1956 Term to follow all other preferences heretofore Granted. Settle order. Affidavit of Michael J. Kenny Filed.

Mar. 7—By Abruzzo, J. Pre Trial Order filed.

Mar. 7—By Abruzzo, J. Order filed granting motion for a preference and placing cause on Jury Day Calendar for April 2, 1956, etc.

Apr. 2—Galston, J. Case called—adjd. to April 16, 1956.

Apr. 16—Galston, J. Case called—adjd. to April 24, 1956.

1956

Apr. 24—Galston, J. Case called. R. & P.

May 2—Affidavit of Eugene Underwood Filed.
Affidavit of Robert Klonsky Filed.

May 2—Galston, J. Case called—Trial ordered and adjd. to May 3, 1956.

May 3—Galston, J. Trial resumed and cont'd to May 4, 1956.

May 4—Galston, J. Trial resumed and continued to May 7, 1956—11 A.M.

May 7—Galston, J. Trial resumed, both sides rest,—trial cont'd May 8.

May 8—Transcript of Record of May 3, 1956 Filed.

May 8—Galston, J. Trial resumed—motion to dismiss etc.—denied—Jury returns verdict for pltff. for $65,000—motions reserved—jdgt. docketed—Trial concluded—Order for sustenance filed.

May 16—Notice of motion filed to set aside verdict (May 17, 1956).

May 17—Galston, J. Hearing on motion to set aside. Decision reserved—all papers May 21.

May 23—Galston, J. Decision rendered on motion to set aside verdict. Motion denied (see memo on file). Settle order.

May 29—Notice of Appeal Filed.

May 29—Supersedeas Bond Filed for $72,400.00.

June 7—Transcript of Record Filed.

1956

June 11—Notice of Motion Filed to Correct Transcript etc. June 13, 1956.

June 13—Before Byers, J. Hearing on Motion to Correct Transcript Referred to Galston, J.

June 19—Affidavit of Philip F. DiCostanozo filed.

June 21—By Galston, J. Order filed granting motion to correct transcript.

June 29—By Byers, J. Order Filed Ext. Time to File Record on Appeal to August 27, 1956.

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[488] Charge of the Court

The Court: Members of the jury, we now approach the final chapter in the trial of this case: the case brought by Pasquale Palermo against the Luckenbach Steamship Company, Inc.

As you know, the plaintiff was not employed by the Luckenbach Company but by the stevedoring firm, the corporation known as Turner and Blanchard, Inc. He was injured while on the vessel S. S. MARINE SNAPPER, which was owned and operated by the Luckenbach Steamship Company.

His complaint alleges, in part, as follows: That on the 16th day of February, 1955, the plaintiff, while in the performance of his work in the capacity of a longshoreman and while on deck at the No. 2 hatch of the aforesaid vessel, the S. S. MARINE SNAPPER, he was, through the carelessness, negligence and recklessness of the defendant, its agents, servants and/or employees, and because of the unseaworthy condition of the vessel, caused to slip and fall, as a result of which he sustained serious permanent, devastating and personal painful injuries.

[489] A further allegation of the complaint is that the aforesaid accident was caused without fault or want of care on the part of the plaintiff, who in nowise contributed thereto, but resulted wholly and solely by and through the carelessness, negligence and recklessness of the defendant, its agents, servants and/or employees, in that they failed and neglected to keep the aforesaid vessel, particularly the No. 2 hatch thereat, in a safe and seaworthy condition in failing to provide the plaintiff with a reasonably safe place in which to work and failing and neglecting to make due and timely inspection of the lights, decks, appliances and equipment then and there being used by the plaintiff and his co-workers in the performance of the work at hand, and in failing to provide experienced and skilled employees.

Now, to that complaint the defendant interposed an answer denying the essential material allegations of the complaint. As a result of the allegations of the plaintiff and the denials of the defendant, there arise issues to be determined by you.

Let me say first that in respect to the plaintiff, he has to sustain the allegations which he has made in his complaint by a fair preponderance of the credible evidence. That leads me to follow with this principle [490] of law that you, as the jury, exercise exclusive prerogative in two respects: You pass upon the facts; you are the finders of the facts. Neither what counsel may have said in their summations, in their recollection of what the evidence in the case discloses, nor, indeed, what I may say in any reference that I may make to the record, need conclude you. You are really the finders of the facts. That is the basis of our jury system.

Secondly, you pass upon the credibility of the witnesses. In a case such as this, where there is such conflict in respect to the facts, credibility becomes very important. Now, I can give you no rule of law which will measure credibility. Credibility in the ordinary walks of life, why, it is deter-

mined by the appearance of the man who tells the story: whether there are important contradictions or inconsistencies in his tale. The important factor of self-interest must always be considered. But, by and large, I assume that you will do what we ordinarily do in our walks of life: use your common sense in order to determine credibility.

Now, how do you measure these facts? Let me say that you are to determine the facts on the basis of the record, of the evidence, and you must cast [491] aside any natural inclination that you might have of bias or prejudice or prepossession. It is the evidence that you must consider and that only, together with such principles of law as I have stated or may give you. The evidence consists of what the witnesses have testified to, plus the exhibits in the case.

Now, in this case, the plaintiff described how this accident happened. He said that he and his gang and others of the stevedoring company had been engaged on the steamer, working until about 8 o'clock, having come on board, I think, some time earlier in the afternoon, and that at 6 o'clock they suspended their labors in order to go ashore for their supper. Returning at 7 o'clock or a few minutes thereafter, the plaintiff, with Guarracino, a fellow stevedore, came up on board the vessel, and Guarracino was in the lead, with the plaintiff some five feet behind him—if my recollection serves me accurately.

The plaintiff said that he slipped and tripped and fell and in trying to save himself injured his right elbow and upper arm, the whole arm. Mr. Guarracino did not see the plaintiff fall but heard his exclamation and turned around and found him there.

Now, the important part of the plaintiff's story is that he slipped, he said, on grease, and tripped [492] on the sill and that at the time that passageway was dark. There was no illumination. That forms a critical part of the

plaintiff's case. No one saw him fall. In respect to the absence of light, Guarracino corroborates him. As to the grease, there is some, perhaps, inconsistency in the story told by Guarracino, because he said that the next day after the accident he looked at the spot and saw the grease. Well, that couldn't have been accurate in respect to time because the ship sailed that night and Guarracino wasn't on board to see what the condition of the passageway was the following morning. But he did say that he had observed grease in that passageway.

The question of the presence of grease and the question of the lighting are both contradicted by the defendant's witnesses.

The plaintiff said he saw grease before supper in that passageway. Mr. Purcell, for the defendant, who was the super-cargo clerk, testified he saw no foreign substance in that passageway, and that the passageway was lighted.

The witness who has been referred to as "Shorty" said he saw nothing wrong in the passageway. The watchman says there was no grease and there was [493] illumination.

There is testimony that two of the lights marked in the photographs as Light 1 and Light 2 were out at the time that this accident happened and that one bulb was thereafter restored by the relief mate, who testified here before you yesterday. In addition to that, the matter of illumination was the subject of testimony given by this defendant's witnesses who say that there were lights on the mast, lights that projected forward and aft, and that these lights were flood lights and the aft lights were powerful enough to reach the passageway, so that it wasn't dark.

Well, these are the issues of fact: It is for you to say whether there was grease in the passageway at the time that the plaintiff fell; whether he fell in the manner in which he did say he fell; whether the illumination was on or whether there was no illumination of that passageway.

It is the duty of the vessel, among other duties, in respect to this passageway at least, it is the burden imposed by law on the vessel, to make it seaworthy.

Now, what does seaworthy mean in this case? Seaworthy applied to this case means that that passageway must be reasonably safe for the purpose for which it was intended. Consequently, you have to [494] determine whether it was so, or whether there were other acts of negligence which precipitated this accident.

Now, in determining liability, there can be no liability imposed on the defendant unless the plaintiff has established to your satisfaction the essential allegations of his complaint. If you find that the plaintiff has done that, then you approach another subdivision of the matter of liability, and that is whether the plaintiff was guilty of contributory negligence.

The defendant says he was. Of course, the burden is on the plaintiff to show that he was free from contributory negligence. As I recall, the plaintiff said that he had gone over this passageway before and that he had noted the grease spots. Knowing that, should he have been more careful on his return than he was?

The defendant urges that if the plaintiff knew there were grease spots on the port side in the passageway leading to Hatch 3, why, he should have used the starboard; to which the plaintiff responds that that would not have been a wise move because the unloading was in progress to the shore, the winches were in operation and that the unobstructed passageway [495] was on the port side.

If you should find that the plaintiff contributed to the happening of the accident by his own negligence, that is, after having first found the defendant is liable, if you should so determine, then, from any award you might otherwise give the plaintiff, you have to deduct whatever percentage of negligence the plaintiff is guilty.

Charge of the Court

For the purposes of illustration, and only for the purpose of illustration, let me say this is what I mean: If you were to award the plaintiff X dollars in the event of no contributory negligence by the plaintiff, and if you find that the plaintiff was 50 per cent negligent, then you would, in your verdict, bring in a verdict for X dollars divided by two and not for X dollars.

Now, if there is to be a verdict in favor of the plaintiff for any sum, then you approach the second question in the case, and that is: How are you going to measure the injuries which he sustained and how are you going to reach a sum to compensate him?

Well, I can indicate only elements for your consideration. First, there is the matter of pain and suffering, and in this case, humiliation; secondly, there is the matter of the nature and extent [496] of the injuries; and thirdly, there is the loss of earnings and loss of prospective earnings. How are you going to measure those?

Well, first let me say that any sum you determine on, you must have in mind that a lump sum award to the plaintiff will have an earning power. It will earn money, and therefore the sum should be the present worth rather than X dollars multiplied over the number of years that you think he could keep on working.

Now, there were references made to the expectancy tables. The man was 44 years of age at the time of the accident and he has an expectancy of life of 26 years, point something or other. I have to caution you that expectancy of life is not to be confounded with the matter of the determination of the number of years that the man will be able to work. We all, presumably, have an expectancy of life, but it does not mean that we will be able to earn money during the period of that expectancy.

Now, the testimony of the doctors here, going to the matter of the nature and extent of the injuries, may be summed up in the fact that he cannot carry on the work

of a longshoreman, nor, indeed, in any undertaking which would involve the using of the right arm, beyond the use of the fingers. He can do the work [497] of a watchman; he might perform the work of a messenger.

In determining his average income, you must be convinced that he will make an earnest effort to earn such money as his physical condition will enable him to earn.

This Exhibit 6 will show you what his recorded earnings were during the periods in 1950, 1951, 1952, 1953 and 1954. He wasn't continuously employed because there had been some injury, as testified to by him and the doctors, which interfered with his work during part of the time.

As to 1956, we have nothing to do with that year except as to what he may have earned. The accident happened on February 16, 1955. This exhibit will indicate what the record is with respect to his earnings prior to that time.

That he suffered pain, and that he suffers pain now, those are elements to be taken into consideration; that he sustains a certain humiliation, that is an element also to be taken into consideration. He is also to be compensated for any expenses that he incurred for doctors.

Some reference has been made to compensation. Any reference to compensation in respect to the [498] amounts must be disregarded by you. That is a matter between the plaintiff and his employer, Turner and Blanchard. Compensation has nothing whatever to do with the relationship between the plaintiff and the steamship company.

Such exhibits as are in the case which relate to statements which were made by him or in his behalf, so far as those statements are concerned, and independently of any awards, you may consider those.

Now, Madam Foreman and Members of the Jury, your verdict must be unanimous.

Before you retire with the exhibits in the case, I will ask counsel to note any exceptions.

• • •

Defendant's Requests to Charge

• • •

8. Mr. Palermo had a duty to use reasonable care so as not to injure himself. He had a duty to use the care which a reasonably prudent man would have used under the prevailing conditions and like circumstances, keeping in mind that he was an experienced longshoreman and had a duty to use his special experience and knowledge so as to avoid injuring himself. Thus you might find that Mr. Palermo was negligent if you found that a reasonably prudent longshoreman would not have used the passageway which Mr. Palermo used under the conditions then existing and knowing what Mr. Palermo knew or should have known at the time. Mr. Palermo also had a duty to be alert, and to look out for himself and to observe and avoid danger and he must be presumed to have known what the ordinary use of his faculties should have made apparent to him.

• • •

12. Even if you should find that Mr. Palermo was hurt because the passageway on the port side of the deck housing was unsafe and that the unsafe condition caused the ship to be unseaworthy or resulted from the negligence of the Steamship Company, I charge you as a matter of law that Mr. Palermo is not entitled to any money from the defendant if there was a safe passageway on the starboard side of the deck housing which he could have used and if Mr. Palermo knew or ought to have known that fact and nevertheless voluntarily chose to use the port passageway.

• • •

[537] Judgment

[SAME TITLE]

The Jury empanelled in the above entitled action having rendered a verdict in favor of the Plaintiff in the sum of $65,000—

It is accordingly adjudged that the judgment in the sum of $65,000 be and is hereby entered and that judgment be docketed accordingly and that costs when taxed be docketed.

Dated: Brooklyn, New York,
May 8, 1956.

PERCY G. B. GILKES,
Clerk.

by JOHN F. LANE,
Deputy Clerk.

[543] Opinion Denying Defendant's Post-Trial Motions

The motion to set aside the verdict, and for judgment for the defendant notwithstanding the verdict, must be denied on the ground that there was before the jury proof sufficient to support the allegations of the complaint.

The matter that gave me some concern was the amount of the verdict.

In a memorandum filed today in * Selock v. Waterman Steamship Corporation, Civil No. 12691, I wrote on a similar motion in respect to alleged excessiveness of the jury's verdict. Therein I expressed the opinion that a judge sitting without a jury cannot substitute his judg-

* Opinion in *Selock* printed *infra*, p. 13a.

ment of what the award should be for that of a jury. It is significant that the defendant's memorandum does not disclose any federal authority which would warrant me in so doing. The federal authorities are practically uniform in holding that a judge should be most scrupulous in [544] granting a motion to set aside a verdict on the ground of excessiveness unless it can be demonstrated that there was no substantial evidence to support the verdict. Nor since the verdict was a general verdict can one speculate as to what part if any the defense of contributory negligence played in the determination of the jury. The plaintiff proved facts which the jury was warranted in believing established defendant's liability. The plaintiff also established by medical testimony that the plaintiff was very seriously injured, and that the right upper extremity of his arm was practically completely disabled, and that at most he had the use of the fingers of his right hand to a very limited extent. He suffered extremely great pain and was subjected to a state of mind which might humiliate him throughout his life.

It is not for the court to determine by mathematical formula the elements that are involved in pain and suffering, and nature and extent of injury: and the prognosis of the doctors of permanent disability was apparently received by the jury with full effect.

It cannot be concluded that the jury's verdict was arbitrary or capricious. At most the jury may have been overgenerous, but it is not for the court to determine the amount. See the following cases cited in my memorandum in Selock v. Waterman Steamship Corporation; Werthan Bag Corp. v. Agnew, 202 Fed. 2d 119; Armit v. Loveland et al., 115 Fed. 2d 308, and Jones v. Atlantic Refining Co., 55 Fed. Supp. 17. [545]

The motion is denied.

Settle order.

CLARENCE E. GALSTON,
U. S. D. J.

Memorandum Opinion in * *Selock* v. *Waterman S/S Corp.*

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

Civil No. 12691

May 23, 1956

STANLEY SELOCK,
Plaintiff,

against

WATERMAN STEAMSHIP CORPORATION,
Defendant.

In this personal injury action the jury reported a verdict for the plaintiff in the sum of $28,000.00. Motions made to set aside the verdict and for judgment notwithstanding the verdict were denied with a reservation by the court on the defendant's motion addressed to the alleged excessiveness of the verdict.

I have been disturbed at recent jury verdicts in respect to the amounts awarded. On the other hand, I must recognize the function which a jury performs in weighing the evidence and reaching a conclusion. That the jury is the finder of the facts is not a mere phrase. In consequence, what a court might do in determining an award if sitting without a jury must not be the determinant of a motion to set aside the verdict of a jury as excessive.

In *Werthan Bag Corp.* v. *Agnew*, 202 Fed. 2d 119, the court quoted from *Tennant* v. *Peoria & P.U. Ry. Co.*, 321 U. S. 29:

* Referred to in opinion, *supra* A 11a.

> "Courts are not free to re-weigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions, or because judges feel that other results are more reasonable."

In *Armit v. Loveland, et al.*, 115 Fed. 2d 308, it was said:

> "Courts in general are reluctant to disturb a jury's verdict on the ground of excessiveness where the damages are unliquidated and there is no fixed measure of mathematical certainty. *Powers v. Wilson*, 2 Cir., 140 Fed. 2d 960; *U. S. Can Co. v. Ryan*, 8 Circ., 39 Fed. 2d 445."

Jones v. Atlantic Refining Co., 55 Fed. Supp. 17, also discloses, citing *Armit v. Loveland*, supra, that courts in general are reluctant to disturb a jury's verdict on the ground of excessiveness where the damages are unliquidated and there is no fixed measure of mathematical certainty.

On the record in this case disclosing the average earnings of the plaintiff for a three year period, his loss of earnings from 1952 to 1956, and the nature and extent of the injuries which he sustained, the motion is denied.

Settle order.

CLARENCE E. GALSTON,
U. S. D. J.

No. 350.1

Office - Supreme Court, U.S.
FILED
AUG 7 1957
JOHN T. FEY, Clerk

Supreme Court of the United States

OCTOBER TERM 1957

PASQUALE PALERMO,

Petitioner,

—against—

LUCKENBACH STEAMSHIP COMPANY, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PHILIP F. DI COSTANZO
Attorney for Petitioner
66 Court Street
Brooklyn, New York

ROBERT KLONSKY
On Petition

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Does the majority opinion introduce harsh common law principles long held by this Court to be inapplicable to maritime torts by reversing a jury verdict finding unseaworthiness in favor of a longshoreman? .....

II.

Is there plain error in the admission by the majority that petitioner did prove dangers on the passageway proximately causing his grievous injuries but predicating reversal on the trial Judge's refusal to charge an erroneous proposition of law that would deprive a longshoreman of the comparative negligence doctrine and introduce instead the harsh common law defense of contributory negligence as a complete bar? .....

III.

Can a general verdict in favor of a longshoreman who had proven grievous injuries proximately caused by unseaworthiness and the shipowner's failure to provide him with a reasonably safe passageway, which he and others customarily used, be reversed on the harsh common-law doctrine of assumption of risk? .....

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IV.

Should not certiorari be granted in the exercise of this Court's power to afford proper supervision of the federal judiciary and correct plain error in response to the strongly expressed concern of Chief Judge Clark of the Court of Appeals, dissenting herein, as to " . . . a growing tendency in this court to upset awards in jury cases"? .....

V.

As a matter of law, did the Court of Appeals err by reversing a jury verdict which is fortified by the exercise of discretion by the trial Judge who refused to grant defendant's motions, which discretion is supported by the record herein? .....

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Supreme Court of the United States

OCTOBER TERM 1957

PASQUALE PALERMO,

Petitioner,

—against—

LUCKENBACH STEAMSHIP COMPANY, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice and Associates Justices of the Supreme Court of the United States:

Petitioner, Pasquale Palermo, prays that a Writ of Certiorari be issued to review the decision and judgment of the United States Court of Appeals for the Second Circuit filed July 5, 1957, reversing a final judgment entered in the United States District Court for the Eastern District of New York on May 8, 1956, upon a jury verdict before Galston, *J.*, awarding petitioner-plaintiff $65,000.00 for personal injuries sustained as a longshoreman aboard respondent's vessel on February 16, 1955.

The opinion of the Court of Appeals, made a part of the appendix to this petition, with a dissenting opinion by Chief Judge Clark, is not yet officially reported. The opinion of the District Court, by Galston, *J.*, denying defendant-respondent's motion to set aside the verdict and for judgment for the defendant notwithstanding the verdict, is set forth in full on pages 11A and 11B of the appendix for the respondent-defendant-appellant in the Court below.

Jurisdiction

The jurisdiction of this Court is based upon the provisions of 28 U. S. C. 1254(1). The judgment of the Court of Appeals reversing the judgment of the United States District Court for the Eastern District of New York was entered on July 5, 1957, having been argued January 11, 1957, decided July 8, 1957; Waterman, *C.J.* and Lumbard, *C.J.* for reversal and remand; Clark, *Chief J.* for affirmance.

Questions Presented

I.

Does the majority opinion introduce harsh common law principles long held by this Court to be inapplicable to maritime torts by reversing a jury verdict finding unseaworthiness in favor of a longshoreman?

Without citing a single case in support of its novel position, decisions in point all being to the contrary, the reversal is predicated on the reasoning set forth in the majority opinion that " . . . we do not think a ship, when it is tied to a pier, is unseaworthy if a safe route is provided to the plaintiff's place of work, and the plaintiff knowingly elects to forego that route for one that he has reason to believe is dangerous." This question is posed in the light of the following:

A. The petitioner and other witnesses testified that in fact both the starboard and port routes were dangerous, and that the route traversed by petitioner was that customarily used by all aboard ship while the vessel was in the process of discharging cargo. The hypothetical alternate route by using the thwartship passageway to the starboard side and then proceeding forward to where the No. 2 hatch was then discharging cargo had not been used by any person aboard ship during cargo operations.

B. The majority opinion cites *Hardie* v. *New York Harbor Dry Dock Corp.*, 9 F. 2d 545, 546 (2°Cir. 1925) in support of its erroneous proposition of law, although admitting that the issue of unseaworthiness was not there involved, and that Judge Learned Hand, who wrote the *Hardie* opinion, later explained it in *Lynch* v. *U. S.*, 163 F. 2d 97, 99, as follows:

> "... but I doubt that it would be safe to say that the mere existence of one safe way was always a complete exoneration. That depends, I think, upon the likelihood that the employees would not take the unsafe way; if there was a reasonable probability that they might do so, I think the shipowner's duty extends to reasonable care to see what dangers lurk in the other way, and to advise the employees of them."

The *Hardie* case, *supra*, concerned a wrongful death action under State law, not against a shipowner, on behalf of the estate of a ship repairer's employee, where contributory negligence was found and determined to be a complete bar.

On this, Chief Judge Clark dissenting herein wrote that the instant case required more than a mere warning, and in fact the duty to keep passageways seaworthy "is not satisfied by warning the users of defects and allowing them to find alternative routes."

C. Factually, the majority opinion of the Court of Appeals relies in great measure on the ship's log and the supercargo's memorandum book to show that the No. 3 hold was not worked between 6 P. M. and 9 P. M. on February 16th, and therefore two winchmen would not be blocking the thwartship passageway, and that there would be no danger from drafts being discharged over the starboard passageway from that hatch. Here again the Court below

invades the province of the jury and ignores these balancing facts:

(1) There is no proof in the record that petitioner or any other longshoreman knew that the cargo operations from No. 3 hatch, which had continued up to 6 P. M. as with all other hatches, would be discontinued during a period commencing at 7 P. M.

(2) In fact, cargo operations were resumed at No. 3 hatch at 2130 and it is reasonable to infer, particularly in the absence of any evidence to the contrary, that the No. 3 gang had not been dismissed from their stations between 7 P. M. and 9:30 P. M.

(3) The jury considered these facts and in the light of all the testimony resolved the conflict, if any, in favor of petitioner, as did the trial Judge on respondent's motions.

II.

Is there plain error in the admission by the majority that petitioner did prove dangers on the passageway proximately causing his grievous injuries but predicating reversal on the trial Judge's refusal to charge an erroneous proposition of law that would deprive a longshoreman of the comparative negligence doctrine and introduce instead the harsh common law defense of contributory negligence as a complete bar?

We are here concerned with a reversal predicated on a refusal by the trial Judge to charge that even where the passageway on which petitioner walked was unseaworthy and was hurt thereby, that nonetheless there can be no recovery for grievous injuries if the longshoreman knew or should have known that the passageway on which he was walking was unsafe and that there was an alternative safe passageway on which he could have proceeded.

It is apparent from a reading of the final paragraph of the majority opinion that remands for another jury to "determine, *inter alia*, the relative risks presented by the two alternative routes to the plaintiff's place of work and the plaintiff's knowledge of a substantial difference in those risks, if such existed, at the time he elected to go by the starboard passageway," that the majority was applying as a test for unseaworthiness the same considerations that could only apply to the defense of contributory negligence. What petitioner might have known about the risks is no more than a question of contributory negligence. The majority opinion recognizes that "assumption of risk" should not be applicable. We respectfully submit the law to be that a passageway not fit for its purpose (without illumination and covered in part with grease) renders a vessel unseaworthy regardless of the possible existence of a safe alternative passageway, and whether known or unknown to a longshoreman.

The text of the crucial request, and the irrefutable analysis by the Chief Judge in his dissent, are set forth in the dissenting opinion as follows:

(Request to Charge)

"12. Even if you should find that Mr. Palermo was hurt because the passageway on the port side of the deck housing was unsafe and that the unsafe condition caused the ship to be unseaworthy or resulted from the negligence of the Steamship Company, I charge you as a matter of law that Mr. Palermo is not entitled to any money from the defendant if there was a safe passageway on the starboard side of the deck housing which he could have used and if Mr. Palermo knew or ought to have known that fact and nevertheless voluntarily chose to use the port passageway."

(Part of Analysis by Chief Judge Clark)

"This proposed instruction stated the law incorrectly and there was no error in rejecting it. First, the instruction was an attempt to introduce assumption of risk into the case. It makes no sense any other way. For if its theory was contributory negligence, it wrongly allowed the jury to defeat all recovery, instead of merely reducing it. If its theory was to provide a particular application of negligence or seaworthiness, it was confusing, for it started from the premise that the jury had already resolved these issues in favor of the plaintiff. It thus forces a compulsion of choice on the plaintiff which neither the facts nor the law justifies" (p. 30 of appendix to petition).

III.

Can a general verdict in favor of a longshoreman who had proven grievous injuries proximately caused by unseaworthiness and the shipowner's failure to provide him with a reasonably safe passageway, which he and others customarily used, be reversed on the harsh common-law doctrine of assumption of risk?

Where there is a general verdict in a maritime cause predicated on a shipowner's breach of the warranty of seaworthiness, and there is an appropriate charge on comparative negligence and the diminution of damages to the extent of petitioner's contribution to the accident, there is plain error when the Court of Appeals states that the doctrine of assumption of risk would not be applicable and then to erroneously apply this doctrine, as pointed out in the dissenting opinion for "it makes no sense any other way," and ". . . their result in substance rests on that analysis; they support their decision by cases turning on

that doctrine; and the error which they find is a failure to instruct the jury on that doctrine" (dissenting opinion, pp. 27, 30 of appendix to petition).

IV.

Should not certiorari be granted in the exercise of this Court's power to afford proper supervision of the federal judiciary and correct plain error in response to the strongly expressed concern of Chief Judge Clark of the Court of Appeals, dissenting herein, as to " . . . a growing tendency in this court to upset awards in jury cases"?

The majority opinion concedes there was "conflicting testimony" on the crucial issue of whether petitioner-longshoreman was afforded a safe alternative passageway, and reversed and remanded for a new trial without dismissal of the complaint because "The evidence below is too conflicting on several crucial questions of fact." It was error for the Court of Appeals to reverse a final judgment, predicated on the jury verdict resolving this conflict in favor of petitioner, and remanding for another jury's determination on the same issue of fact. This question is posed in the light of the following:

A. Chief Judge Clark dissenting herein wrote:

> "I have had occasion recently to express my concern at a growing tendency in this court to upset awards in jury cases—today's decision continues that trend, adding some new curiosities" (p. 27 of appendix to petition).

B. The record clearly shows that the passageway on which the accident occurred was not fit for its purpose, admitted by the majority opinion, and that the hypothetical

alternate route proposed by respondent and rejected by the jury presented even greater dangers of cargo gear and drafts in operation from the starboard side to the shore.

C. The jury was clearly charged as to respondent's contention that "The defendant urges that if plaintiff knew there were grease spots on the port side in the passageway leading to hatch 3 (*sic*), why, he should have used the starboard. . . . " This was rejected by the jury and its verdict fortified by the opinion of Galston, *D.J.*, in denying all motions directed against the verdict.

V.

As a matter of law, did the Court of Appeals err by reversing a jury verdict which is fortified by the exercise of discretion by the trial Judge who refused to grant defendant's motions, which discretion is supported by the record herein?

Statement of the Case

Petitioner was employed by an independent contractor as a longshoreman in the capacity of a hatch foreman on February 15 and 16, 1955, aboard respondent's S. S. Marine Snapper. On February 16, 1955, at about 7:05 P. M., following a supper break, while proceeding on the port passageway to join his men already working in the after part of the No. 2 hatch, he was caused to slip, trip and fall over an obscured sill across the passageway by reason of grease from a nearby winch and the absence of any illumination where he and other longshoremen customarily walked while cargo was being discharged on the opposite or starboard side.

At the time of the accident the working hatches were actually discharging cargo. The No. 3 hatch had been discharging cargo with the other hatches to 6 P. M. and had

ceased operations until 9:30 P. M. the same day, as appears in respondent's log and supercargo memorandum book. There is no evidence that petitioner or any other longshoreman knew that the No. 3 hold would not resume the discharge of cargo commencing at 7 P. M. as it had been discharging up to the time of the supper break.

At the place of the accident there was grease on the passageway related to a nearby winch drum, located about a foot away from the port passageway leading to the No. 2 hatch. The winch drum had been greased and oiled by members of the ship's crew and the runners had been covered with grease by means of a mop-like brush dipped into a pail. The location of these grease spots was described by a witness as "all around that deck," "grease spots on that deck." (See pages 2a to 7a, 10a, 28a of plaintiff's appendix below.)

Further, the area was dark by reason of burned out light bulbs, described in the ship's log as "bulkhead lights out, two. Electrician replaced," which entry was made after the accident. (See pages 11a, and 14a of plaintiff's appendix below.)

As regards the starboard passageway which respondent successfully urged below as an "alternative safe passageway," it was described by another hatch boss, Guarracino, a few steps ahead of petitioner when he slipped and fell over the sill, as being unsafe. He testified "It is safer to walk on the portside, because on the starboard side the drafts are coming out of the different hatches." He explained this danger by pointing out that the discharge operation was already in progress from all hatches over the inshore or starboard side, as all gangs had preceded the hatch bosses aboard by about 10 to 15 minutes, emphasizing that he and the petitioner had used the port passageway as "we always go on that side, that is a safety

measure that we take." Respondent's witness Purcell, a super cargo clerk, admitted that he himself used the port passageway during cargo discharge on the starboard side because it was safer (p. 26a of plaintiff's appendix below).

Petitioner testified that he slipped and while attempting to balance himself, tripped over the sill. As he fell the weight of his body went on his outstretched right hand, he being right handed. As he slipped he felt "something smooth, fast," underfoot. The exact words recorded in the ship's log were: "Patsy Palermo, hatch boss No. 2 after gang tripped and fell, injured right elbow and hand. He tripped on treadle by bridge house . . ." (pp. 14a, 16a of plaintiff's appendix below).

At the time of the accident petitioner was 45 years of age, earning between $75 and $100 per week. He has not worked since the date of the accident.

The Columbus Hospital record discloses plaintiff sustained "fracture and dislocation, comminuted, extensive of right elbow involving olecranon, and upper shaft and coronoid process and head of upper shaft of radius." In addition there is noted several small shaft fragments in the elbow, and irregularity of the head of the radius, and a posterior lateral dislocation at the elbow joint (p. 17 of plaintiff's appendix below).

Dr. Mario F. Tagliagambe, the surgeon who operated for 3 hours to unsuccessfully reduce the fractures, testified that additionally "there were a lot of joint disruptions, both in ligaments and capsule form," a great deal of fluid in the elbow joint, and there was inserted permanently two screws and one circular wire. After discussing the deformity with marked restriction, atrophy "very little flexion and very little extension from this fixed position," with the failure of the operation to allow a maintenance of a proper position, the doctor concluded that the extremity is almost

ankylosed by reason of bony block and soft tissue block, so that he has close to the 100 per cent level of permanent disability preventing him from ever returning to his work as a longshoreman, regardless of any arthrodesis operation that may subsequently be performed. (See pages 20a to 24a of plaintiff's appendix below.)

Dr. David J. Graubard, another medical witness for the plaintiff, described plaintiff's condition and stated that at the time of trial, 13 months since the accident, "there has been no union, no callus and the thing has refused to heal," demonstrating "a complete destruction of the entire elbow joint with a loss of the head of the radius here and with the destruction of the ulna." He described the arm as "absolutely valueless" with "100 percent loss of function of the entire right upper extremity—and this man is right-handed" (pp. 24a to 25a of plaintiff's appendix below).

Though plaintiff had been examined by a Dr. Balensweig on behalf of the defendant, said doctor was not called to offer any medical testimony to contradict plaintiff's medical experts. In fact, defendant's trial counsel admitted in summation that the plaintiff "did have a bad break," and that there is no serious dispute about the arm (pp. 28a and 29a of plaintiff's appendix below).

With respect to the use of the alternate passageway, the trial Court's charge to the jury contains the following passage:

> "The defendant urges that if the plaintiff knew there were grease spots on the port side in the passageway leading to hatch 3, why, he should have used the starboard; to which plaintiff responds that that would not have been a wise move because the unloading was in progress to the shore, the winches were in operation and that the unobstructed passageway was on the port side" (p. 7a of defendant's appendix below).

Jurisdiction in the Court of first instance was based on diversity of citizenship and that damages exceeded the jurisdictional amount of $3000.00.

The jury verdict in the amount of $65,000.00 was general on causes of action for unseaworthiness and negligence in failing to afford petitioner a safe place to work. All motions directed against the verdict were denied by the trial Judge in a memorandum opinion stating liability and substantial damages were proven. Reversal by the Court of Appeals was solely predicated on the trial Judge's refusal to charge the request set forth in Question II, *supra*.

Reasons for Granting the Writ

1. The majority decision is in conflict with all controlling decisions of this Court to the effect that a longshoreman does not assume the risk of an unsafe place to work or the breach of a shipowner's continuing and non-delegable obligation of seaworthiness. *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, 66 S. Ct. 872; *Pope & Talbot* v. *Hawn*, 346 U. S. 406, 74 S. Ct. 202; *Mahnich* v. *Southern SS Co.*, 321 U. S. 96, 64 S. Ct. 455. Instead, the only decision the majority opinion cites in which the presence of a better alternative route allegedly defeated recovery for unseaworthiness is the unappealed lower Court decision of *Manera* v. *U. S.*, 124 F. Supp. 226, which is discussed in the latter portion of the dissenting opinion below as really not at all concerned with a choice between a seaworthy and unseaworthy ladder.

2. As the controlling decisions hold that there is no distinction as to liability between an injury to a longshoreman proximately caused by unseaworthiness while the vessel is tied to a pier, and to a seaman while the vessel is at sea, then the principle of *Socony-Vacuum Co.* v. *Smith*, 305 U. S.

424, 59 S. Ct. 262, that assumption of risk is not a defense with respect to use of a defective appliance when the plaintiff chose to use an unsafe appliance instead of a safe method which was known to him, must necessarily apply to compel reinstatement of the final judgment in the district Court. This Court held in the *Socony-Vacuum Co.* v. *Smith* case, *supra,* that under such circumstances conduct formerly labeled "assumption of risk" was to be "applied in conjunction with the established admiralty doctrine of comparative negligence and in harmony with it" (p. 429 of 305 U. S.).

Both the majority and dissenting opinions by this Court in *Pope & Talbot* v. *Hawn, supra,* have established clearly that a longshoreman is owed a warranty of seaworthiness by reason of doing work historically performed by seamen, so that vis-a-vis the vessel he is free of the common law defenses erroneously applied by the Court of Appeals herein. The sense of the majority opinion below is that federal maritime law does not control. We respectfully submit this is plain error.

Though the Court of Appeals herein seemingly holds to the contrary, it must be that whether a vessel is tied to a pier or is at sea, or whether the injured person disabled by unseaworthiness is a longshoreman or a crew member, the culpable shipowner is not relieved of its continuing and non-delegable obligation of seaworthiness. This has been clarified and established in decisions emanating from this Court subsequent to the "assumption of risk" and "negligence" cases cited in the opinion below. In point is what this learned Court stated in the *Hawn* case, *supra,* where the warranty was extended to a carpenter, as follows:

> "His need for protection from unseaworthiness was neither more nor less than that of the stevedores then working with him on the ship or of the seamen who

had been or were about to go on a voyage. All were subjected to the same danger. All were entitled to like treatment under law" (p. 207 of 74 S. Ct.).

In the instant case there was a charge on comparative negligence and mitigation of damages should the jury determine that petitioner's fault contributed to the accident, and in fact, the burden on plaintiff was even more strict than the law requires as the charge stated "of course the burden is on the plaintiff to show that he was free from contributory negligence" (p. 7a of defendant's appendix below).

3. Not only is the majority opinion in conflict with decisions emanating from the United States Supreme Court recited above, and fails to cite a controlling case to support its novel and discredited basis for reversal, it is also in conflict with the Court of Appeals for the Ninth Circuit in the case of *Pacific Far East Lines, Inc.* v. *John Williams,* 234 F. 2d 378, where on facts similar to those in the case at bar it was held that the jury was not unwarranted in finding unseaworthiness or negligence or both. As the only basis on which the instant reversal can be understood is the application of the discredited principle of "assumption of risk," there is also conflict with the Court of Appeals for the Sixth Circuit in the case of *Imperial Oil, Ltd.* v. *Drlik,* 234 F. 2d 4, 9, where that Court held assumption of risk could not be a defense to an action by a dock crew man, and that contributory negligence, however gross, is not a bar to recovery, but only goes to mitigate damages.

The ambiguity and confusion in the phrase "assumption of risk" is discussed by Mr. Justice Frankfurter in his concurring opinion to *Tiller* v. *Atlantic Coast Line R.R.,* 318 U. S. 54, 63 S. Ct. 444, 452, and in *Owens* v. *Union Pac. R.R.,* 319 U. S. 715, 720, 63 S. Ct. 1271, 1274, Mr. Justice Rutledge stated: "and assumption of risk took over also,

in misguided appellation, large regions of the law of negligence. What in fact was absence from departure of due care by the defendant came to be labelled 'assumption of risk.'"

4. The Court below erroneously applies the principles of shore-side negligence to a maritime tort concluded by a unanimous jury verdict and fortified by a trial Judge's denial of all motions wherein the general verdict embraced a finding of a breach of a shipowner's non-delegable and continuing obligation to provide petitioner with a seaworthy passageway, admittedly unseaworthy and proximately related to his grievous and permanent injuries by the very request to charge which is the basis of the reversal. The district Court's final judgment in the amount of $65,000.00 in favor of a 45 year old hatch boss who has a useless right extremity forever precluding him from doing any work of the nature he knows, with the injuries admitted by respondent in its decision not to call a doctor to rebut any of the medical testimony clearly demonstrating the total permanency and petitioner's inability to return to work, should not have been disturbed on the basis of a defective and clearly erroneous request to charge on the discredited principle of "assumption of risk."

5. The reversal by the Court of Appeals is also in conflict with the recent decision of this learned Court in *Neese v. Southern Railway Company*, 350 U. S. 77, 76 S. Ct. 131, reversing 216 F. 2d 772, wherein it was held error for the Court of Appeals to reverse a district Judge who denied a motion for a new trial where the action of the district Judge was not without support in the record.

6. The decision of the Court of Appeals herein, reversing the judgment for petitioner, is predicated on error and is the concern of the Chief Judge of said Circuit as dem-

onstrating a "growing tendency in this court to upset awards in jury cases." This Honorable Court should grant certiorari so that there be proper supervision of the federal judiciary as to the purpose and function of a jury trial, as was recently expressed by this Court in *Ferguson* v. *Moore-McCormack Lines, Inc.*, 77 S. Ct. 457, wherein *Wilkerson* v. *McCarthy*, 336 U. S. 53, 62, 69 S. Ct. 413, 418, was cited to the following effect:

> "Courts should not assume that in determining these questions of negligence juries will fall short of a fair performance of their constitutional function."

The strongly justified concern of Chief Judge Clark, corroborated by the record herein, is apposite to this Court's recent ruling, as to when petitions would be granted, in *Rogers* v. *Missouri P. R Co.*, 1957, 352 U. S. 500, 77 S. Ct. 443, 451, as follows:

> "Special and important reasons for the grant of certiorari in these cases are certainly present when lower federal and state courts persistently deprive litigants of their right to a jury determination."

7. The instant decision of the Court of Appeals would defeat and abort in any re-trial of this case and all future cases to which it would be cited as authority, the prior decisions of that Court, as well as those of this Court with respect to the warranty of seaworthiness and the abrogation of the harsh common law defense of assumption of risk and contributory negligence as complete bars. By the instant decision the Court of Appeals has assailed major principles of law on which liability for maritime accidents had heretofore been determined, and defeats liability based on *admitted* unseaworthiness proximately related to injuries by an interference with a jury's function of determining facts, merely on the conflicting evidence as to whether there

was another passageway available which would not have been as dangerous. This reasoning can be applied to "alternate" gear, equipment and appurtenances to defeat recovery for unseaworthiness in any future maritime accident.

WHEREFORE, petitioner respectfully prays that a writ of certiorari should be granted and that this Court reverse the Court below and reinstate the original judgment of the district Court entered substantially more than a year ago, inasmuch as the decision of the Court of Appeals is so clearly erroneous as to make argument unnecessary before this Honorable Court, or any other relief as the Court may deem just and proper.

PASQUALE PALERMO, *Petitioner*

By: PHILIP F. DI COSTANZO, *Attorney*

Dated: Brooklyn, New York

July 1957

ROBERT KLONSKY

On Petition

APPENDIX TO PETITION

OPINION

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 119—October Term, 1956.

(Argued January 11, 1957 Decided July 8, 1957.)

Docket No. 24245

PASQUALE PALERMO,

Plaintiff-Appellee.

—v.—

LUCKENBACH STEAMSHIP COMPANY, INC.,

Defendant-Appellant.

Before:

CLARK, *Chief Judge,* and
LUMBARD and WATERMAN, *Circuit Judges.*

Plaintiff, a longshoreman, obtained a jury verdict in the Eastern District of New York against defendant shipowner for injuries sustained while cargo was being discharged from defendant's ship. From judgment entered thereon, Galston, *J.*, defendant appeals. Reversed and remanded.

PHILIP F. DICOSTANZO, Brooklyn, N. Y. (Robert Klonsky, New York City and Thomas J. Livornese, of counsel) (and on brief), *for plaintiff-appellee.*

BURLINGHAM, HUPPER & KENNEDY (Eugene Underwood, William M. Kimball, of counsel), New York City, *for defendant-appellant.*

WATERMAN, *Circuit Judge*:

The defendant, Luckenbach Steamship Company, appeals from a judgment below entered upon a jury verdict awarding the plaintiff, Pasquale Palermo, $65,000 damages for personal injuries sustained while he was working as a longshoreman on a ship owned and operated by the defendant. The complaint alleged that the injuries were caused by the defendant's negligence in failing to provide the plaintiff with a reasonably safe place to work, and by the unseaworthy condition of the defendant's steamship, the *Marine Snapper*.

The evidence adduced at the trial tended to establish the following facts: On February 15 and 16, 1955, the plaintiff was employed by Turner & Blanchard, Inc., a stevedoring concern engaged in the unloading of the *Marine Snapper*. Palermo was in charge of a hatch gang that was unloading cargo from the aft part of the No. 2 hatch. The ship lay starboard to the 35th Street Pier, Brooklyn, and was discharging cargo on that side.

At 6:00 P. M. on February 16, the longshoremen, including the plaintiff, left the ship for "lunch." At 7:00 P. M. they again boarded the vessel, Palermo delaying a minute or two on the pier to make sure that all his men had returned to work.

The *Marine Snapper*, a C-4 cargo vessel, has a raised forecastle deck on which are located the forward deck house and Nos. 1 and 2 hatches. The gangway was aft at the lower level of the well deck. After boarding on the starboard side, Palermo crossed over to the port side and

proceeded forward. He climbed the ladder to the forecastle deck, and then entered the port passageway, which ran between the deck house and the port rail. At the end of the passageway, flush with the forward end of the deck house, was a three-inch sill on the deck. At approximately 7:05 P. M. the plaintiff tripped on the sill and fell forward to the deck, thereupon sustaining the severe and disabling injuries to his elbow and right arm for which he here sought recovery. Palermo testified that as he approached the sill, he slipped on some oil or grease that had accumulated on the deck after a nearby winch drum had been greased by members of the ship's crew. He also testified that the two nearest bulkhead lights were off, and that the port passageway was very dark. This latter statement was corroborated by the testimony of another hatch boss who had preceded Palermo through the passageway.

On cross-examination the plaintiff testified that prior to his accident he knew that there was grease on the deck of the port passageway and that the bulkhead lights which normally illuminated that area were out. Indeed, he had called the latter fact to the attention of one of the crew members when he left the ship at 6:00 P. M., since it was already dark at that hour.

There was further evidence that the plaintiff, after mounting the ladder to the forecastle deck, could have recrossed the ship to the starboard side by means of a three-foot thwartships passageway directly abaft the deck house, and could then have proceeded forward to his place of work through the starboard passageway, which was sufficiently lighted. Since the plaintiff's hatch gang was working on the starboard side of the ship, it appears that this route would have been no longer than the one chosen by Palermo.

There was conflicting testimony, however, as to the difficulties or dangers posed by this route. One witness for

the plaintiff testified that both holds No. 2, which was forward, and No. 3, which was on the well deck just aft of the forecastle, went into operation promptly at 7:00 P. M., and that anyone thereafter walking along the starboard side might have been hit by drafts being discharged from those hatches, or might have encountered winch grease, coils, or other equipment in operation. Also, if No. 3 hold was being worked, two winchmen would be located in the thwartships passageway abaft the deck house, thus tending to impede travel by that route. However, the ship's log and the supercargo's memorandum book indicated that the No. 3 hold was not worked between 6:00 P. M. and 9:00 P. M. on February 16.

Both the port and starboard passageways, as well as the passageway directly abaft the deck house, were covered, and thus protected from unloading operations. Running across the forward end of the deck house was a narrow platform raised about two feet off the forecastle. This platform was protected from above by the edge of the bridge.

On appeal the defendant argues that the trial court erred (1) in refusing to charge the jury that the plaintiff was not entitled to any recovery if he voluntarily chose to use a passageway known by him to be unsafe and if there was another available passageway known by him to be safe; and (2) in denying the defendant's motion after trial to set aside the verdict for excessiveness.

We believe that the court below, in refusing to give the requested charge,[1] committed reversible error, and we are therefore remanding this case for a new trial. In view of this disposition, it is unnecessary to discuss the appellant's second contention.

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1 The charge requested by defendant that the Court did not submit to the jury and the charge on this point that the Court gave are each quoted in full in the body of the dissenting opinion.

Judge Learned Hand, writing for this court, said in *Hardie* v. *New York Harbor Dry Dock Corp.*, 9 F. 2d 545, 546 (2 Cir. 1925), a suit for negligence by the administratrix of the estate of a machinist's helper against the intestate's employer, a ship repairer: "If there be two ways, one safe and the other dangerous, the servant chooses the dangerous way at his peril, if the difference is known to him." A few years later, in a negligence action by a harbor worker against the shipowner, this court, relying on *Hardie*, held that "There is no duty to keep a dark way safe if a light way is provided." *Long* v. *Silver Line, Ltd.*, 48 F. 2d 15, 16 (2 Cir. 1951).

In the ensuing years this court, even when the defendant appeared to have been negligent, applied the doctrine of assumption of risk on several occasions to deny recovery to seamen who sued the shipowner for injuries sustained while on board but at a time when the plaintiffs were not technically "on duty." See, *e.g.*, *Holm* v. *Cities Service Transp. Co.*, 60 F. 2d 721 (2 Cir. 1932); *Johnson* v. *United States*, 74 F. 2d 703 (2 Cir. 1935). Subsequently, in *Socony-Vacuum Co.* v. *Smith*, 305 U. S. 424 (1939), the Supreme Court held that assumption of risk was not a defense in a suit brought by a seaman under the Jones Act to recover for injuries resulting from his use, while "on duty," of a defective appliance of the ship when the plaintiff chose to use the unsafe appliance instead of a safe method which was known to him. The Court declared that under such circumstances conduct formerly labeled "assumption of risk" was to be treated as only contributory negligence, and thus could be considered only in mitigation of damages. The role of the assumption of risk doctrine in cases where the seaman's injury occurred while he was "off duty" was expressly left open.

In *Wong Bar* v. *Suburban Petroleum Transport, Inc.*, 119 F. 2d 745 (2 Cir. 1941), this court reaffirmed its ad-

herence to the rule set out in the *Holm* case, and stated that assumption of risk was a defense, under the Jones Act, when a seaman's injury resulted from the knowing choice of a defective appliance when a safer one was available, if the injury occurred when the plaintiff was not on duty. The rationale underlying this distinction apparently sprung from an appreciation of the substantially increased, and somewhat unique, pressures under which a seaman works while he is on duty. The application of this rationale has been rendered extremely difficult, if not impossible, however, by the recent rapid development of the law in the area of maritime torts.[2] Be that as it may, despite the attempt of the plaintiff to commingle the reasoning of the *Hardie* case with that of the *Holm* decision, we emphasize that in deciding this case we are *not* invoking assumption of risk principles, nor are we applying a rule whose applicability depends upon the distinction between "on duty" and "off duty."

It seems clear that the *Hardie* rule, albeit qualified, has retained its vitality in cases where the action sounds solely in negligence. In *Lynch* v. *United States,* 163 F. 2d 97 (2 Cir. 1947), decided prior to the *Hawn* extension of the unseaworthiness doctrine to harbor workers other than stevedores, Judge Learned Hand, in a concurring opinion, 163 F. 2d at 99, explained his earlier decision:

> "In *Hardie* v. *New York Harbor Dry Dock,* we held that, if there was a safe way provided for an employee

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2 For example, the availability of the doctrine of unseaworthiness, traditionally limited to seamen, was extended to stevedores in *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85 (1946), and then to other harbor workers in *Pope & Talbot, Inc.* v. *Hawn*, 346 U. S. 406 (1953). In addition, the doctrine itself was transformed from a duty to use *due diligence* to provide a seaworthy ship to an *absolute* duty to so provide. See, *e.g.*, *Seas Shipping Co.* v. *Sieracki*, *supra*, and *Mahnich* v. *Southern S.S. Co.*, 321 U. S. 96 (1944). See generally Gilmore & Black, The Law of Admiralty, §§6-38 to 6-44, 6-55 (1957).

> of a contractor, and he chose an unsafe way, the owner was absolved. That was right, as applied to the facts of that case, but I doubt that it would be safe to say that the mere existence of one safe way was always a complete exoneration. That depends, I think, upon the likelihood that the employees would not take the unsafe way; if there was a reasonable probability that they might do so, I think the shipowner's duty extends to reasonable care to see what dangers lurk in the other way, and to advise the employees of them."

Of course, if the plaintiff was already aware of the danger lurking in his chosen course prior to his injury, the shipowner owed him no duty of warning. *Long* v. *Silver Line, Ltd.*, 48 F. 2d 15, 16 (2 Cir. 1931).

The *Hardie* case was recently quoted and relied upon by Judge Weinfeld in a wrongful death action based upon the defendant shipowner's alleged negligence in failing to provide the decedent stevedore with a reasonably safe place to work. *Grenawalt* v. *South African Marine Corp.*, 130 F. Supp. 432 (S. D. N. Y. 1955), *aff'd*, 243 F. 2d 575 (2 Cir. 1957). It is our belief, moreover, that the *Hardie* rule is applicable even in actions where the plaintiff sues for a breach of the shipowner's implied duty to maintain his ship in a seaworthy condition. That is, we do not think a ship, when it is tied to a pier, is unseaworthy if a safe route is provided to the plaintiff's place of work, and the plaintiff knowingly elects to forego that route for one that he has reason to believe is dangerous. Support for our position can be found in a recent District Court decision. *Manera* v. *United States*, 124 F. Supp. 226 (E. D. N. Y. 1954). *Cf. Bohannon* v. *United States*, 92 F. Supp. 700 (S. D. N. Y. 1950) (where a similar result was supported by reliance on the "assumption of risk" cases mentioned above).

However, on the basis of this record we cannot direct the entry of judgment for the defendant. The evidence below is too conflicting on several crucial questions of fact, the resolution of which must be left to the jury. Thus, although it seems clear that Palermo was aware of the dangers inherent in the unlighted port passageway, it is less clear that the thwartships and starboard passageways presented a safe and easily traversible route to the plaintiff's place of work at the No. 2 hatch. For example, the defendant contends that there could have been no winchmen in the thwartships passageway abaft the deck house at 7:05 P. M. because the Nos. 3 and 4 holds were not being worked at that time. The plaintiff, on the other hand, claims that two winchmen were located in the passageway just prior to the accident, and that their presence would have impeded travel by that route. The plaintiff also argues that he would have been exposed to the perils incident to discharging operations on the starboard side if he had proceeded forward to his place of work on that side of the ship. This assertion was met below by the defendant with evidence that only holds No. 1 and No. 2 were in operation at the time of plaintiff's injury. The defendant also points out that the plaintiff was the boss of the hatch gang working at the aft end of the No. 2 hatch, and "if, upon reaching the forward end of the starboard passage he had found a draft of cargo swinging in such a way as to endanger his going further forward, he could have either waited or, as hatch boss, directed the suspension of work until he reached the place he desired to reach." With less force, the defendant also argues that the plaintiff could have used the narrow, but protected, platform along the forward end of the deck house in any emergency.

Hence at a new trial it will be necessary, under instructions from the court in accord with the principles outlined above, for the jury to determine, *inter alia*, the relative

risks presented by the two alternative routes to the plaintiff's place of work and the plaintiff's knowledge of a substantial difference in those risks, if such existed, at the time he elected to go by the starboard passageway.

Reversed and remanded.

CLARK, *Chief Judge* (dissenting):

I have had occasion recently to express my concern at a growing tendency in this court to upset awards in jury cases. See *Kermarec* v. *Compagnie Generale Transatlantique*, 2 Cir., May 21, 1957. Today's decision continues that trend, adding some new curiosities. Thus my brothers find reversible error in the trial judge's failure to give a particular requested charge, but they never quote the request or the charge actually given. They next repudiate any suggestion that they would use the anachronism of "assumption of risk," whose shifting meanings we recently discussed in *Sanderson* v. *Berkshire-Hathaway, Inc.*, 2 Cir., June 17, 1957. But their result in substance rests on that analysis; they support their decision by cases turning on that doctrine; and the error which they find is a failure to instruct the jury on that doctrine. Lastly, their general discussion seemingly points to a directed verdict for the defendant until they ultimately shy from so drastic a ruling and rest the forced retrial upon the judge's rejection of what is, to say the least, a highly dubious formulation of law. I do not find in all this a sound reason for disturbing the jury's verdict and the court's judgment.

Turning to the crucial issue, there was a factual dispute concerning the relative safety of the route which the plaintiff took and a hypothetical route which the defendant claimed he might have taken. The plaintiff contended his route was safer and shorter; the defendant denied these

facts. This comparison of routes affects four possible issues in the case: (1) the defendant's negligence; (2) unseaworthiness; (3) plaintiff's contributory negligence; (4) plaintiff's assumption of risk. The trial judge, after a judicious, if lengthy, exposition of the pleadings and the evidence, went on to charge the jury as follows:

> "Well, these are the issues of fact: It is for you to say whether there was grease in the passageway at the time that the plaintiff fell; whether he fell in the manner in which he did say he fell; whether the illumination was on or whether there was no illumination of that passageway.
>
> "It is the duty of the vessel, among other duties, in respect to this passageway at least, it is the burden imposed by law on the vessel, to make it seaworthy.
>
> "Now, what does seaworthy mean in this case? Seaworthy applied to this case means that that passageway must be reasonably safe for the purpose for which it was intended. Consequently, you have to determine whether it was so, or whether there were other acts of negligence which precipitated this accident.
>
> "Now, in determining liability, there can be no liability imposed on the defendant unless the plaintiff has established to your satisfaction the essential allegations of his complaint. If you find that the plaintiff has done that, then you approach another subdivision of the matter of liability, and that is whether the plaintiff was guilty of contributory negligence.
>
> "The defendant says he was. Of course, the burden is on the plaintiff to show that he was free from contributory negligence. As I recall, the plaintiff said that he had gone over this passageway before and that he had noted the grease spots. Knowing that, should he have been more careful on his return than he was?

"The defendant urges that if the plaintiff knew there were grease spots on the port side in the passageway leading to Hatch 3, why, he should have used the starboard; to which the plaintiff responds that that would not have been a wise move because the unloading was in progress to the shore, the winches were in operation and that the unobstructed passageway was on the port side.

"If you should find that the plaintiff contributed to the happening of the accident by his own negligence, that is, after having first found the defendant is liable, if you should so determine, then, from any award you might otherwise give the plaintiff, you have to deduct whatever percentage of negligence the plaintiff is guilty."

It is clear from his charge that the judge made the following assumptions of law: (1) that there was no need to charge as to the defendant's negligence, since unseaworthiness provided a route to recovery, with fewer elements to prove; (2) that the failure to light the port passageway and to keep it clean from grease was ground for recovery if it rendered it less than reasonably safe for its intended purpose; (3) that the plaintiff's alleged choice of a more dangerous route went only to reduce the amount of recovery under the doctrine of contributory negligence; (4) that assumption of risk was not apposite on these facts. I agree with all four conclusions. My brothers do not discuss the charge explicitly, but their discussion shows that they quarrel with the second conclusion and accept the others.

My brothers reverse because, as they say, the trial judge refused to charge that the plaintiff "was not entitled to any recovery if he voluntarily chose to use a passageway known by him to be unsafe and if there was another avail-

able passageway known by him to be safe." The charge actually requested was this:

> "12. Even if you should find that Mr. Palermo was hurt because the passageway on the port side of the deck housing was unsafe and that the unsafe condition caused the ship to be unseaworthy or resulted from the negligence of the Steamship Company, I charge you as a matter of law that Mr. Palermo is not entitled to any money from the defendant if there was a safe passageway on the starboard side of the deck housing which he could have used and if Mr. Palermo knew or ought to have known that fact and nevertheless voluntarily chose to use the port passageway."

This proposed instruction stated the law incorrectly and there was no error in rejecting it. First, the instruction was an attempt to introduce assumption of risk into the case. It makes no sense any other way. For if its theory was contributory negligence, it wrongly allowed the jury to defeat all recovery, instead of merely reducing it. If its theory was to provide a particular application of negligence or seaworthiness, it was confusing, for it started from the premise that the jury had already resolved these issues in favor of the plaintiff. It thus forces a compulsion of choice on the plaintiff which neither the facts nor the law justifies.

The charge is further quite objectionable in its assumption that the defendant could in no event owe any higher duty to the plaintiff than to warn him of the danger in the port passageway. The majority cite the concurring opinion in *Lynch* v. *United States*, 2 Cir., 163 F. 2d 97, 99, for the proposition that it may be negligent not to warn of the dangerous passage; but neither that case nor any other case cited to us holds that the duty of reasonable

care is always satisfied by a mere warning. Often, where the continued presence of the peril serves no important useful purpose to the defendant and the cost of removing the peril is small, a reasonable man will remove the danger, and not just warn of it. This is a perfect example of such a situation: How simple it would have been to replace the burned-out light bulbs, wipe up the grease, and prevent this accident!

Until now I have assumed with my brothers that the liability of the shipowner for unseaworthiness is identical with his duty to use reasonable care to keep the vessel reasonably safe for invitees, but of course this is not so. Seaworthiness is a higher standard, as the court below understood. *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, 94. The defendant would not be liable under notions of negligence for a dangerous patch of grease or burned-out bulbs until it should have discovered and repaired them, but its liability for unseaworthiness arose almost as soon as the defects occurred. *Poignant* v. *United States*, 2 Cir., 225 F. 2d 595; *Grillea* v. *United States*, 2 Cir., 232 F. 2d 919; *Williams* v. *Tide Water Associated Oil Co.*, 9 Cir., 227 F. 2d 791, certiorari denied *Tidewater Associated Oil Co.* v. *Williams*, 350 U. S. 960. The duty to keep stairs and passageways seaworthy is not satisfied by warning the users of defects and allowing them to find alternative routes. See *Troupe* v. *Chicago, Duluth & Georgian Bay Transit Co.*, 2 Cir., 234 F. 2d 253, 258.

The only case cited by my brothers in which the presence of a better alternative route defeated recovery for unseaworthiness is the unappealed lower court decision, *Manera* v. *United States*, D. C. E. D. N. Y., 124 F. Supp. 226, involving two ladders into a hold, one of which was without an upper section. The plaintiff fell off the short ladder and recovery was denied, *inter alia*, because he should have used the safer ladder. But that case reveals a critical

factual distinction: the ladder from which the plaintiff fell, while it was less safe, was nevertheless "seaworthy"; it had been necessary to remove its upper section to make room for cargo in the 'tween deck. It was in its normal condition when plaintiff injured himself by using it improperly. In the instant case the grease and burned-out lights on the port passageway were not deliberate alterations designed to make the vessel perform its function better, but were defects of no use to the ship and of great danger to its crew. See *Long* v. *Silver Line*, 2 Cir., 48 F. 2d 15.

Thus the decisive issues of fact were left to the jury under a proper and appropriate charge. Its decision for the plaintiff should stand.

JUDGMENT

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 5th day of July one thousand nine hundred and fifty-seven.

Present:

HON. CHARLES E. CLARK,
Chief Judge,

HON. J. EDWARD LUMBARD,
HON. STERRY R. WATERMAN,
Circuit Judges.

PASQUALE PALERMO,
Plaintiff-Appellee,

—v.—

LUCKENBACH STEAMSHIP CO.,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District

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SEP 13 1957
JOHN T. FEY, Clerk

Supreme Court of the United States

OCTOBER TERM 1957

No. 350

PASQUALE PALERMO,

Petitioner,

—against—

LUCKENBACH STEAMSHIP COMPANY, INC.,

Respondent.

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Respondent's brief emphasizes the extreme departure of the majority opinion below from accepted principles of maritime tort law. To allow this decision to stand would constitute an abrogation of all decisions emanating from this Honorable Court that hold a longshoreman injured aboard a vessel by reason of the shipowner's breach of its non-delegable obligation of seaworthiness is entitled to the same measure of recovery as any member of the ship's service.

Unseaworthiness of the passageway involved and its causal relationship to petitioner's grievous injuries are admitted in the majority opinion below and in respondent's brief. The fulcrum of the reversal was the trial Judge's refusal to charge a request that admitted this unseaworthiness. What he did charge on this issue was eminently fair to respondent (p. 7a of defendant's appendix to brief below).

Respondent's brief mis-states the issue, finds support for the erroneous decision below in repudiated cases predicated on assumption of risk, clearly not in point, seeks to revise the law by contending that a longshoreman injured aboard a vessel moored to a dock is not entitled to the Federal Maritime Law as would a seaman, and finally, misquotes the trial Judge as stating he was "powerless" on refusing to set the verdict aside.

The sole issue is predicated on the trial Judge's refusal to charge that a passageway used by petitioner, concededly unseaworthy and unsafe, cannot be the basis of recovery if there was a safe alternate route on the opposite side of the vessel. To justify the decision below that reversed on the trial Judge's refusal to instruct the jury on this patently erroneous request, respondent realizes that the petitioner's status as a longshoreman must necessarily be deprecated and unfavorably compared to that of a seaman. On page 4 of its brief in opposition to the petition, respondent writes:

> "Although petitioner was a longshoreman, and in that sense a seaman and a beneficiary of a warranty of seaworthiness, only the ordinary principles of negligence apply to him. The Jones Act—F.E.L.A. 'even the slightest' rule does not apply because he does not meet the statutory condition that he be an employee of respondent."

There is pregnant in this quotation that the "ordinary" principles of negligence, i.e., assumption of risk, contributory negligence as a complete bar, and the fellow servant rule must apply against a longshoreman whether his action be for negligence or unseaworthiness. If this strange proposition was meant to apply to maritime negligence solely, then its argument as to "ordinary principles of negligence" would have no bearing as the instant case was

predicated on alternative grounds of unseaworthiness and negligence, and the issue herein is concerned with *admitted* unseaworthiness. Even as to maritime negligence the harsh common law principles which are repudiated by the Jones Act (46 U. S. C. 688) are likewise inapplicable to a longshoreman. The premise in respondent's extraordinary argument that the principles of Federal Maritime Law should not apply to a longshoreman is that he is not akin to a seaman because he does not fall within the provisions of the Jones Act. This *non sequitur* underlies the error of the majority opinion below that discussed and applied assumption of risk, obviously so despite the denial that its decision was thereby motivated.

That petitioner could not sue under the Jones Act is no basis for denying him his rights as a seaman *pro hac vice*, above and beyond the harsh common law defenses of "ordinary" negligence, has been stated time and again by this Learned Court. In *International Stevedoring Co.* v. *Haverty*, 272 U. S. 50, 47 S. Ct. 19, this Court held longshoremen were "Jones Act" seaman. The subsequent passage of the Longshoremen's and Harbor Workers' Act, 33 U. S. C. 901, *et seq.* precluded a direct action by an injured longshoreman against his employer, but did not deny his third party rights against a shipowner. Sec. 33(a) of the Act, 44 Stat. 1440, 33 U. S. C. 933(a). In maritime negligence, therefore, the substance of the Jones Act is apposite to a longshoreman's rights, and the advanced principles of maritime tort law as to a crew member do equally favor a longshoreman.

This Court in *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, 101, 66 S. Ct. 872 concisely answered respondent's argument by holding that the Longshoremen's and Harbor Workers' Act did not limit any of the rights a longshoreman has against a shipowner, and on page 100 also stated:

> "Nor does it follow from the fact that the stevedore gains protections against his employer appropriate to the employment relation as such, that he loses or never acquires against the shipowner the protections, not peculiar to that relation, which the law imposes as incidental to the performance of that service."

The rationale of giving Jones Act rights to a longshoreman against a third party shipowner, though not available against his employer, was expressed on page 97 of *Sieracki, supra,* citing the lower Court opinion with approval, as follows:

> "It seems, therefore, that when a man is performing a function essential to maritime service on board a ship the fortuitous circumstances of his employment by the shipowner or a stevedoring contractor should not determine the measure of his rights. This is the very basis on which the Jones Act was held applicable to give redress to an injured stevedore in International Stevedoring Co. v. Haverty. * * *"

As to whether there is any difference in applying the warranty of seaworthiness when the vessel is tied to a dock and not at sea, this Court in *Sieracki, supra,* p. 90, held as follows:

> "And the liability applies as well when the ship is moored at a dock as when it is at sea (cases cited)."

In *Pope & Talbot* v. *Hawn,* 346 U. S. 406, 413, 74 S. Ct. 202, 207, the language of the majority opinion that "all were subjected to the same danger. All were entitled to like treatment under law.", must mean that all ship workers, be they carpenters, longshoremen or members of the crew who are exposed to shipboard hazards as a consequence of

their employment, are within the class excluded from the harsh common law principles of "ordinary" negligence.

After carefully reading the cases cited by respondent in support of its proposition as to an alternative passageway and assumption of risk applicable to a longshoreman as a complete bar, we are of the same opinion as Chief Judge Clark who dissented in the instant case and commented that the authorities cited were not in point. These cases cited by respondent either antedate the 1946 *Sieracki* case, *supra*, without any consideration of the warranty of seaworthiness, or concern themselves with alternate routes from which the user was warned away, or where there was no issue of fact as to the availability of a safer, shorter and direct alternate route. The jury herein was charged on respondent's contention as to the "safe" alternate route, and this conflict was resolved properly (p. 7a of defendant's appendix below).

The record also clearly shows that the trial Judge did not consider himself "powerless" to set the verdict aside, but held he was constrained to allow it to stand because "The plaintiff proved facts which the jury was warranted in believing established defendant's liability," and "the federal authorities are practically uniform in holding that a judge should be most scrupulous in granting a motion to set aside a verdict on the ground of excessiveness unless it can be demonstrated that there was no substantial evidence to support the verdict" (p. 12a of defendant's appendix below).

Equally unpersuasive is respondent's argument on excessiveness, not considered by the majority opinion below, though it did observe that petitioner sustained "severe and disabling injuries to his elbow and right arm * * *" (p. 21 of petition). That this is not a real issue is apparent from respondent's decision at the time of trial not to call a

doctor to dispute the unquestioned totally and permanently disabling injuries herein.

A further compelling reason for granting a writ of certiorari to the Court of Appeals for the Second Circuit is the concern expressed by Chief Judge Clark that this case represents the "growing tendency in this court to upset awards in jury cases" and additionally, adds "new curiosities" to the maritime law. Implicit in the Chief Judge's dissent is his request that this Honorable Court grant certiorari in the exercise of its function to supervise and set aright what is tantamount to plain error.

The contention that the trial Judge considered himself "powerless" and the question of excessiveness are specious and extraneous to the final determination sought herein. Summary reversal to the end of a final determination is respectfully urged inasmuch as the majority decision below, pre-empting the proper function of a jury and predicated on rejected principles of law, is so clearly erroneous as to make argument before the Court a waste of time. See: *Securities & Exchange Commission* v. *Otis & Co.*, 338 U. S. 843.

Respectfully submitted,

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IN THE

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OCTOBER TERM, 1957

No. 350

PASQUALE PALERMO,

Petitioner,

—against—

LUCKENBACH STEAMSHIP COMPANY, INC.,

Respondent.

PETITIONER'S BRIEF IN OPPOSITION TO MOTION TO RECALL AND AMEND THE JUDGMENT

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charge (Request No. 12) that petitioner could not recover if the jury found that respondent had furnished a known, safe and convenient route and petitioner voluntarily chose to use an unsafe route which he knew to be unsafe. The Court of Appeals reversed and remanded for a new trial, 246 F. 2d 557, holding that if the jury found the facts to be as indicated in Request No. 12, petitioner's injury did not result from any breach of duty by respondent, and the jury should be permitted to decide those facts under an appropriate charge. This Court granted certiorari and simultaneously reversed and remanded, without briefs or argument on the merits, although respondent's brief opposing certiorari dealt only with reasons why it should not be granted.

Grounds for Rehearing

I. Misapprehension of the Facts.

This Court held that "The petitioner's alleged choice of a *more* dangerous route did not, under the proofs, operate to bar recovery as a matter of law" (emphasis added). Use of the comparative indicates the Court's belief that both routes were dangerous. That is not true. The evidence showed that the starboard passage was safe and Request No. 12 told the jury the law only if they so found. The Court's misapprehension no doubt resulted from its acceptance of erroneous statements in the petition and reply brief that the starboard side was inaccessible and that the vessel was "admittedly unseaworthy". Respondent prays for a hearing and decision based on the facts shown in the record, rather than on partisan assertions by petitioner.

II. Misapprehension of the Law.

The minority summarily reversed on authority of *Rogers v. Missouri Pacific*, 352 U. S. 500. The majority

relied upon *Rogers* to summarily reverse the companion case, *Gibson* v. *Thompson*, No. 142. There are vital distinctions between *Rogers* and this case.

In *Rogers*, the lower court entered judgment for defendant notwithstanding the verdict and this Court granted *certiorari* to consider whether the jury's function had been invaded (352 U. S. at 501). Here, the Court of Appeals has simply ordered a new trial so that a properly charged jury can determine the facts. As such, the decision is completely consistent with *Rogers*.

In *Rogers*, an on-duty employee sued his employer under the F. E. L. A. and this Court, impelled by the provisions of the statute, held that the employer was liable if employer negligence played any part, "even the slightest" (352 U. S. at 506). This suit is by an off-duty non-employee who has no right to the benefits of the statute, and there are compelling reasons of first impression why the extreme *Rogers* rule should not be here applied, at least not without the same full measure of review and mature consideration normally accorded after certiorari has been granted (cf. *Rogers*, 352 U. S. at 509; *Ferguson* v. *Moore-McCormack*, 352 U. S. 521, 527).

Petitioner relied on Judge Clark's dissent, to the effect that the jury must have found the port side unsafe, and claimed that this amounted to unseaworthiness regardless of the safe condition of the starboard side. But reasonable fitness, not "even the slightest" defect, has always been the test of seaworthiness. *Boudoin* v. *Lykes Bros. S. S. Co.*, 348 U. S. 336, and cases cited at p. 339.

Moreover, proximate causation, not whether the condition played "even the slightest" part (*Rogers*, 352 U. S. at 506), has always been the measure of liability. In *The Osceola*, 189 U. S. 158, this Court held that, to result in shipowners' liability, injuries must be "in consequence of" unseaworthiness (p. 175). In *Carlisle Packing Co.* v.

Sandanger, 259 U. S. 255, this Court held that injuries must be "the direct result" of unseaworthiness before the seaman is entitled to recover (p. 259). In *Mahnich* v. *Southern S. S. Co.*, 321 U. S. 96, recovery was allowed because the seaman's injury was "the proximate and immediate consequence of the unseaworthiness" (p. 103).

The majority's opinion and reference to pages 408-9 of *Pope & Talbot* v. *Hawn*, 346 U. S. 406, indicate that petitioner induced a belief that the issue is whether petitioner's negligence should mitigate or bar recovery. That is not and never has been an issue. The question is whether the jury should be permitted to find, if the facts warrant, that petitioner's injury did not result from any breach of duty by respondent.

III. Other Grounds.

Assuming, as petitioner does, that the doctrine of assumption of risk is involved (although the Court of Appeals emphasized that it was not invoking the doctrine, 246 F. 2d at 559), this case raises the very question reserved for later determination in *Socony-Vacuum* v. *Smith*, 305 U. S. 424. *Socony* held that assumption of risk was not a complete defense to a Jones Act claim by a seaman injured while on duty at sea. However, the Court decided to:

> "• • • leave to future cases as they may arise the determination of what rule is to apply in cases where the seaman's election • • • is • • • made while not on duty." (305 U. S. at 433)

Since the reasons *Socony* gave for holding that the doctrine did not bar the Jones Act claim of an on duty seaman injured at sea (305 U. S. at 430-1) are patently inapplicable to a non-Jones Act claim against a third party by an off-duty longshoreman injured in port, we earnestly submit that the *Socony* result should not be summarily applied to a situation expressly left undecided by *Socony*.

Because of conditions long since remedied, seamen who go to sea in ships have been given unique rights against their employers. There is no basis in past or present conditions for summarily bestowing upon an off-duty longshoreman in port greater rights against a shipowner than have ever been granted to an on-duty seaman at sea, or for summarily, and without Congressional legislation after hearings, applying against a shipowner the insurer principles of the Longshoremen's and Harbor Workers' Compensation Act, but without the schedule of awards which imposes limits upon the liability of the longshoremen's own employer.

CONCLUSION

For the foregoing reasons we respectfully urge that this petition for rehearing be granted, that the case be set down for briefs and argument in the regular way and that, upon further consideration, the judgment of the court below be affirmed.

Dated: New York, New York,
November 7, 1957.

EUGENE UNDERWOOD,
Counsel for Petitioner.

WILLIAM M. KIMBALL,
of Counsel.

Certificate of Counsel

I, EUGENE UNDERWOOD, counsel for the above named petitioner do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

EUGENE UNDERWOOD,
Counsel for Petitioner.

Brief in Opposition to Petition for a Writ of Certiorari

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IN THE

Supreme Court of the United States

October Term, 1957

No. 350

PASQUALE PALERMO,

Petitioner,

v.

LUCKENBACH STEAMSHIP COMPANY, INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

EUGENE UNDERWOOD,
WILLIAM M. KIMBALL,
26 Broadway,
New York 4, New York,
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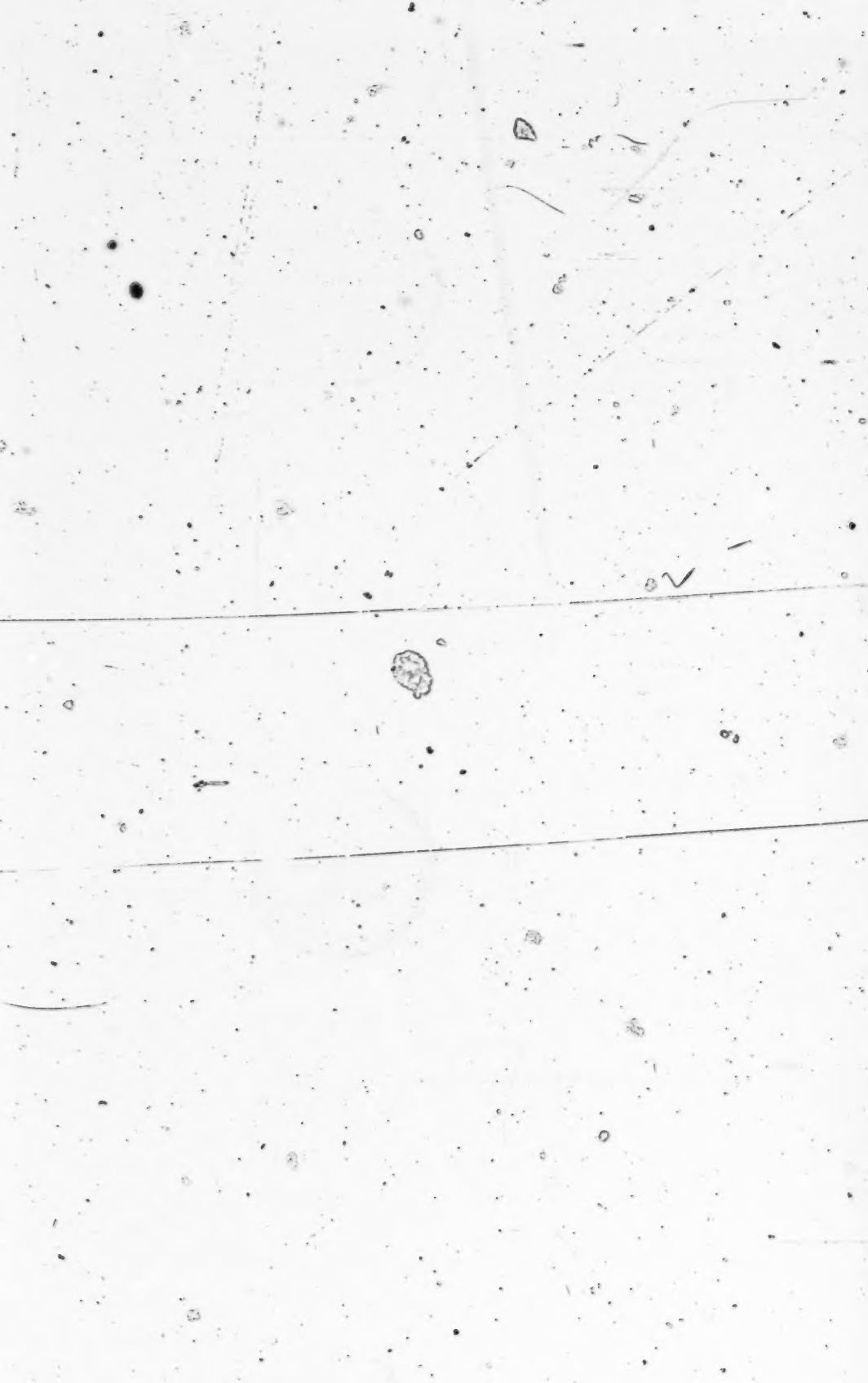

IN THE

Supreme Court of the United States

October Term, 1957

No.

PASQUALE PALERMO,

Petitioner,

—v.—

LUCKENBACH STEAMSHIP COMPANY, INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Opinions Below

The opinion of the Court of Appeals is not yet reported. It is printed in the appendix to the petition at pp. 19 et seq. The charge to the jury is found at pp. 3-9 of appellant's appendix below, and the opinion of the District Court denying respondent's motions after trial, not reported, is found at pp. 11-12 of the same.

Questions Presented

Can a longshoreman recover damages from a shipowner, on grounds of negligence or unseaworthiness, where a safe route to his place of work has been provided, but the longshoreman, although knowing the safe route, elects to take a route known to him to be unsafe and sustains injuries thereon?

On a motion for a new trial for excessiveness of verdict, is the Trial Court powerless to grant the motion unless it can be demonstrated that there was no substantial evidence to support the verdict?

On a motion for a new trial for excessiveness, is a Trial Court powerless to consider whether the jury has made adequate allowance for contributory negligence?

Statement of the Case

As the Court of Appeals found (Appendix to Petition, pp. 20-22) the facts are these:

Petitioner was hatch boss of a gang discharging No. 2 hatch of respondent's steamship MARINE SNAPPER which lay starboard side to the pier. At 6:00 p. m. the longshoremen went ashore for "lunch". At 7:00 p. m. they returned, petitioner a minute or two behind the others. The ship had a raised fore deck on which the bridge house and Nos. 1 and 2 hatches were located. After boarding the ship on the starboard side aft petitioner crossed to the port side, proceeded forward and, at the after end of the fore deck climbed the ladder to that deck. He then walked forward along the port passage between the house and the port rail. Near the forward end he fell, sustaining injury.

There was evidence from which the jury could find (although there was evidence to the contrary) that the port passage was spotted with grease and in darkness. Petitioner testified that he knew of the grease and the darkness but that he "just didn't think" (Appendix, *infra*, pp. i-ii).

There was evidence from which the jury could find that petitioner, after mounting to the fore deck, could have crossed to the starboard side by a thwartships passage directly abaft the bridge house, then forward to his work place along the starboard passage, which was sufficiently

lighted and otherwise safe. Since petitioner's gang was working on the starboard side, that route would have been equally convenient.

Respondent requested charges that petitioner had a duty to use his special knowledge as a longshoreman to avoid injuring himself and was not entitled to recover if he knowingly chose an unsafe route if there was a safe route on the starboard side of which he knew (Appellant's appendix below, p. 10). These were denied and the Court charged that if petitioner, knowing the condition of the port passage, should have been more careful than he was, his recovery need only be diminished *pro tanto* (*id.*, p. 7).

The jury brought in a general verdict for $65,000. Respondent moved to set aside, and for judgment N.O.V., or for a new trial, on the ground that the verdict was contrary to law in that the injuries did not result from any breach of duty by respondent because respondent had provided a safe route which was known to petitioner, and on the ground that the verdict was excessive, particularly in the light of petitioner's flagrant negligence.

The Court denied the motion to set aside and for judgment N.O.V. Dealing with the motion to set aside for excessiveness, the Court felt that "the jury may have been over generous" and admitted that the amount of the verdict "gave me some concern" but concluded that it was powerless to set the verdict aside for excessiveness "unless it can be demonstrated that there was no substantial evidence to support the verdict" (id. pp. 11-12). Respondent urged that the Court must consider whether the jury made any, or adequate, reduction for petitioner's obvious negligence but the Court felt that it was powerless to consider this aspect saying:

> "Nor since the verdict was a general verdict can one speculate as to what part if any the defense of contributory negligence played in the determination of the jury" (id. p. 12).

The Court of Appeals held only that the injuries did not result from any breach of duty by respondent if there was a known, safe route to petitioner's work place and he chose to use one he knew was dangerous. The Court therefore remanded so that the jury, under proper instructions, may pass upon the safety of the starboard passage which the Trial Court refused to permit.

The Court of Appeals did not pass upon either of the other questions, each of which would have required a remand if the Court accepted respondent's position.

Argument

No new law was made or attempted below. This case involves only the application of established principles to its own facts. When petitioner reached the foredeck he had two ways to go around the deck house, *i. e.*, straight ahead on the port passage and to starboard when he reached the forward end of the house, or straight across to the starboard side aft of the house and then forward along the starboard passage. The 'thwartship passage abaft the house was 3' wide and there was no proof that it was either restricted or dangerous—contemporaneous records showed that No. 3 hatch was not then working; hence no operations there could have interfered.

Although petitioner was a longshoreman, and in that sense a seaman and a beneficiary of a warranty of seaworthiness, only the ordinary principles of negligence apply to him. The Jones Act—F.E.L.A. "even the slightest" rule does not apply because he does not meet the statutory condition that he be an employee* of respondent. As to both seaworthiness and negligence the decision below holds

---

* This is no technicality. Without the employer-employee relationship respondent had no power to control petitioner's movements and methods.

only that respondent fulfilled its duty when it supplied a known, safe way to the work place and that the proximate cause of petitioner's injury was his own negligence in pursuing a route which he knew to be unlighted and grease-covered although the equally convenient, safe route was known to him.

1. Warranty of Seaworthiness

The decision below in no way lessens a shipowner's duty to provide a seaworthy ship and there is no conflict with *Sieracki, Hawn or Mahnich* *. The Court below held only that the jury should have been instructed that they must find for the defendant if they found that there was a known, safe and convenient route to petitioner's work place, even if they should also find that there was an unsafe route, known to be unsafe. There is ample precedent for holding that a vessel is not unseaworthy merely because one way is unsafe where the danger is, as here, known and obvious and there is an equally convenient, known and safe counterpart **.

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* *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85; *Pope & Talbot* v. *Hawn*, 346 U. S. 406; *Mahnich* v. *Southern S. S. Co.*, 321 U. S. 96.

** *Hardie* v. *New York Harbor Drydock Corp.*, 9 F. 2nd 545 (1925; 2 Cir.); *Long* v. *Silver Line, Ltd.*, 48 F. 2nd 15 (1931; 2 Cir.); *Holm* v. *Cities Service Transport Co.*, 60 F. 2nd 721 (1932; 2 Cir.); *Johnson* v. *United States*, 74 F. 2nd 703 (1935; 2 Cir.); *Bohannon* v. *United States*, 185 F. 2nd 678, 1951; 2 Cir. Affirming 92 F. Supp. 700 (1950 S. D. N. Y.); *Wong Bar* v. *Suburban Petroleum Transport, Inc.*, 119 F. 2nd 745 (1941; 2 Cir.); *Tampa Interocean S. S. Co.* v. *Jorgensen*, 93 F. 2nd 927 (1938; 5th Cir.), certiorari denied 304 U. S. 566; *Vielski* v. *Pacific-Atlantic S. S. Co.*, 163 F. 2nd 553 (1947; 9th Cir.); *Manera* v. *United States*, 124 F. Supp. 226 (1954; E. D. N. Y.); *Grenawalt* v. *South African Marine Corp.*, 130 F. Supp. 432 (1955; S. D. N. Y.).

The decision below is merely an application of the rule that seaworthiness is not perfection but reasonable fitness *. The decision is consistent even with F. E. L. A. cases which hold no liability where the proximate cause is plaintiff's own disregard of his own safety in electing to pursue a known dangerous way when he knew of an equally convenient, safe one. *Carter* v. *Atlanta & St. A. B. R. Co.*, 338 U. S. 430, 434-5. *Jackson* v. *Illinois Northern Railway*, 224 F. 2d 76 (7 Cir. 1955); *Wolfe* v. *Henwood*, 162 F. 2d 998 (8 Cir. 1947), *certiorari* denied 332 U. S. 773; *Willis* v. *Pennsylvania R. Co.*, 122 F. 2d 248 (2 Cir. 1941), *certiorari* denied 314 U. S. 684.

2. Assumption of Risk

Assumption of risk was not the defense and the Court "emphasize(d) that in deciding this case we are *not* invoking assumption of risk principles" (Petitioner's Appendix, p. 24). The sole basis for the decision was that respondent had fulfilled its duty of due care and seaworthiness by providing a known, safe and convenient route. Without some breach of duty there can be no assumption of risk doctrine. The two are mutually exclusive. *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54; *Owens* v. *Union Pacific R. Co.*, 319 U. S. 715. *Socony-Vacuum Co.* v. *Smith*, 305 U. S. 424, was a Jones Act case from which petitioner takes no help because of the fundamental distinctions, which this Court pointed out at pages 430-1, between sea and shore employment, and because petitioner, not respondent's employee, does not come under the Jones Act or F. E. L. A.

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* *Boudoin* v. *Lykes Bros. S. S. Co.*, 348 U. S. 336, 339; *Mahnich* v. *Southern S. S. Co.*, 321 U. S. 96, 103; *Poignant* v. *United States*, 225 F. 2d 595 (2 Cir.); *Lester* v. *United States*, 234 F. 2d 625, 628-9 (2 Cir.); *Doucette* v. *Vincent*, 194 F. 2d 834 (1 Cir.); *Nunes* v. *Farrell Lines*, 227 F. 2d 619 (1 Cir.); *Reynolds* v. *Royal Mail Lines, Ltd.*, 147 F. Supp. 223, 227 (D. C. Cal.).

3. Alleged Conflicts

There is no conflict with the Ninth or Sixth Circuit decisions petitioner cites. In *Pacific Far East Lines* v. *Williams*, 234 F. 2d 378 (9 Cir. 1956) and *Imperial Oil Limited* v. *Drlik*, 234 F. 2d 4 (6 Cir. 1956) the sole issue was whether the one available way was safe. The issue here was not present, *viz.*, whether the shipowner fulfills his duty by providing one known, safe route where plaintiff is injured while following a route known to him to be unsafe.

There is no conflict with *Neese* v. *Southern Railway Co.*, 350 U. S. 77. There the District Court imposed a remittitur which plaintiff accepted, but the Court of Appeals reversed and remanded, holding that the Court should have set the verdict wholly aside because without support as to damages. This Court held only that the Court of Appeals erred in regarding the action of the District Court as an abuse of discretion, and hence erred in reversing. The contrast with this case is sharp and highlights an additional reason for denying the writ. There can be no question of the power and duty of the District Court, in a proper case, to impose a remittitur; yet, although respondent so urged, the Court considered itself powerless to act "unless it can be demonstrated that there was no substantial evidence to support the verdict" (Appellant's appendix below, pp. 11-12). Plainly, therefore, the Court erred in refusing to consider on its merits the motion to set aside for excessiveness. *Comiskey* v. *Pennsylvania R. Co.*, 228 F. 2d 687 (2 Cir. 1956). This error was the greater because the Court also concluded it was powerless to consider whether the jury had made any, or proper, allowance for petitioner's negligence (id. p. 12). Plainly petitioner was negligent in entering a passage he knew to be unlighted and greasy. *Stoffel* v. *New York, N. H. & H. Ry Co.*, 205 F. 2d 411 (2 Cir. 1953); *Bohannon* v. *United States*, 92 F. Supp. 700 (S. D. N. Y. 1950); *McLean* v. *Studebaker*

Brothers Co., 221 N. Y. 475 (1917); *Cosby* v. *City of Rochester*, 1 N. Y. 2d 396 (1956); *Fox* v. *Mission of the Immaculate Virgin*, 309 N. Y. 812 (1955). The Court had the power and duty to exercise supervision over the jury's deduction for petitioner's negligence; otherwise juries, after listening to the best of instructions as to reducing for contributory negligence, could give away defendants' money without limit. *Socony-Vacuum Company* v. *Smith*, *supra*, 305 U. S. 424 at 432-3; *Union Pac. R. Co.* v. *Hadley*, 246 U. S. 330; *Pennsylvania R. Co.* v. *Sheeley*, 221 Fed. 901 (6 Cir. 1915); *Herring* v. *Luckenbach S. S. Co.*, 137 F. 2d 598 (2 Cir. 1943). Because of these errors, upon which the Court of Appeals did not pass, this case must in any event be remanded to the District Court; hence this petition is premature.

4. Interference with the Jury's Function

It seems incredible that petitioner complains that the Court of Appeals has thwarted the jury's function. The shoe is on the other foot. By the instructions requested but refused respondent sought to have the jury pass upon the existence of a safe and convenient passage on the starboard side. The only interference with the jury's function was the District Court's refusal to let the jury consider that issue. All the Court of Appeals has done is to remand so that the jury may decide.

For the foregoing reasons the petition should be denied.

Respectfully submitted,

EUGENE UNDERWOOD,
WILLIAM M. KIMBALL,
Counsel for Respondent.

New York, N. Y.,
August 30, 1957.

Appendix

Extracts from petitioner's testimony (references are to the record certified by the District Court to the Court of Appeals).

As to Grease.

Direct examination.

"Q. Now, during this day and the day before when you were on the ship, did you walk in that passageway on the port side where you had your accident? A. Yes, sir.

Q. I am talking about the daylight hours. A. Yes, sir.

Q. Will you tell the Court and jury what you observed about the deck in the area of that winch and the passageway when you walked just before you fell? A. Well, it was all spotted and greasy—

Q. You knew it was there? A. Yes, sir" (R. 99).

Cross examination.

"Q. You had worked on the ship the previous day? A. Yes.

Q. You had worked on the ship that day, too? A. Yes, sir.

Q. And you had worked all that day? A. Yes, sir.

Q. How many times did you say you had gone back and forth over that same area? A. About a dozen times.

Q. Was there always grease there? A. Yes.

Q. Always, every time? A. All the time" (R. 143).

* * *

"Q. These grease patches were all over the deck in the area of the winch drums; is that what you say? A. Yes, that particular spot, yes.

Q. You knew they were there? A. Yes.

Q. They had been there all that day and all the previous day? A. Yes, sir" (R. 146).

Appendix—Extracts from Petitioner's Testimony

As to Darkness.

Cross examination.

"Q. Now, when you went off for your lunch at six o'clock was it dark yet; do you remember? A. Yes.

Q. Did you go back by the port side? A. Yes, sir.

Q. In the same passageway that you fell? A. Yes, sir.

Q. And what was the situation as to light at that time? A. It was completely dark.

Q. Just completely dark? A. Yes" (R. 147-8).

* * *

"Q. Had you noticed at any time before that those lights were out? A. Yes, sir.

Q. When? A. It was about before I went, six o'clock.

Q. When you went out to lunch at six o'clock you noticed then that both of those lights were not burning? A. That is right, and I told the mate about it.

Q. Whom did you tell about it? A. One of them mates that was on deck" (R. 150).

Petitioner "Just Didn't Think".

Cross examination.

"Q. So that when you came back after your lunch, you knew that this passageway had grease on it? A. Yes.

Q. And you knew that the lights were out? A. Yes.

Q. And nevertheless you walked along there; is that right? A. Yes, I pass by and I never think for the minute that grease on the floor because your mind on the job.

Q. Did you think and decide to take a chance or— A. No.

Q. You just didn't think? A. Yes, I not think at all" (R. 152).

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IN THE

Supreme Court of the United States

October Term, 1957

No. 350

PASQUALE PALERMO,

Petitioner,

against

LUCKENBACH STEAMSHIP COMPANY, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENT'S MOTION AND BRIEF TO RECALL AND AMEND THE JUDGMENT

EUGENE UNDERWOOD
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New York, New York

WILLIAM M. KIMBALL
H. BARTON WILLIAMS
of Counsel

IN THE

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On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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RESPONDENT'S MOTION TO RECALL AND AMEND THE JUDGMENT

Respondent moves to recall the copy of this Court's judgment certified December 3, 1957, issued to the United States District Court for the Eastern District of New York, and to amend said judgment to provide for remand of the cause to the United States Court of Appeals for the Second Circuit for determination of two points expressly left undecided by the Court of Appeals and not decided by this Court, or, alternatively, to recall said judgment and for leave to argue to this Court the merits of said undecided points.

Dated: New York, New York
December 12, 1957

EUGENE UNDERWOOD
Counsel for Respondent

WILLIAM M. KIMBALL
H. BARTON WILLIAMS
of Counsel

IN THE

Supreme Court of the United States

October Term, 1957

No. 350

PASQUALE PALERMO,

Petitioner,

against

LUCKENBACH STEAMSHIP COMPANY, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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RESPONDENT'S BRIEF IN SUPPORT OF MOTION TO RECALL AND AMEND THE JUDGMENT

Statement

Respondent argued three points to the Court of Appeals: (a) Whether the District Court erred in refusing to charge that petitioner was not entitled to any recovery if he chose to use a known unsafe passageway when there was a known safe alternate passage: (b) whether the District Court had power to consider respondent's motion for a new trial on the ground of excessiveness; (c) if so, whether, in considering that motion, the District Court had power to determine whether the jury made proper allowance for contributory negligence.

In its opinion, the Court of Appeals stated:

> "We believe that the court below, in refusing to give the requested charge, committed reversible error, and we are therefore remanding this case for a new trial. In view of this disposition, *it is unnecessary to discuss the appellant's second contention.*" (246 F. 2d 557, 559) (Italics added)

In its *per curiam* opinion of October 21, 1957, this Court did not advert to the two points, expressly left undecided by the Court of Appeals, but reversed on the only point decided by that Court, saying:

> "The petition for certiorari is granted, and the judgment of the Court of Appeals is reversed and the case is remanded. We hold that the trial court did not commit reversible error in refusing to charge respondent's request No. 12. The petitioner's alleged choice of a more dangerous route did not, under the proofs, operate to bar recovery as a matter of law. The jury was properly instructed that the petitioner's negligence, if any, was to be considered in mitigation of damages under the rule applicable in actions for personal injuries arising from maritime torts."

By letter to the Clerk of this Court dated October 28, 1957, respondent's counsel inquired whether the judgment would order remand to the Court of Appeals for determination of the two points expressly left undecided by that Court and not decided by this Court. On October 29, 1957, the Deputy Clerk replied that:

> "* * * judgment in the above case will state that the case is remanded to the United States Court of Appeals for the Second Circuit."

Accordingly, respondent's petition for rehearing, which was filed on November 12, 1957, did not seek clarification or modification of this Court's opinion so as to expressly provide for remand to the Court of Appeals. The petition

or rehearing was denied on November 25, 1957, and a few days later the Court issued certified copies of its judgment remanding the cause to the District Court.

Respondent has obtained an order of the District Court staying petitioner from making this Court's judgment a judgment of that Court until December 31, 1957, when respondent will be heard on its District Court motion for a stay pending determination of this motion.

If the motion to this Court is denied, petitioner will issue execution on the District Court judgment and respondent will never have its day in an appellate court on two questions, timely raised, each of which respondent strongly believes require reversal of the District Court judgment.

ARGUMENT

1. The Relief is properly sought by this motion.

In *Cahill* v. *New York, N. H. & H. R. Co.*, 351 U. S. 183, the majority granted an identical motion after respondent's petition for rehearing had been denied. A minority dissented on the ground that the question should have been raised by another petition for rehearing which could not be granted because Rule 58(4) bars such consecutive petitions (*Id.*, pp. 186, 188). However, unlike this respondent, the respondent in *Cahill* had urged in its petition for rehearing that the cause should be remanded to the Court of Appeals (*Id.*, pp. 184, 185). Furthermore, the respondent in *Cahill* did not, prior to its petition for rehearing, receive the Clerk's assurance that the cause would be remanded to the Court of Appeals, as was done here. Even the *Cahill* minority conceded that:

> "There are strong arguments for allowing a second petition for rehearing where a rigid application of this rule *would cause manifest injustice.* Cf. *Hormel* v. *Helvering*, 312 U. S. 552, 556-559." (*Id.*, p. 188) (Italics added)

2. The motion should be granted

Although the statement in respondent's brief in opposition to the petition for certiorari noted, that the Court of Appeals had not passed upon two of the questions presented to it, neither petitioner nor respondent argued the merits of those questions to this Court and this Court's opinion makes no mention of those questions. Normally, the Court of Appeals has primary responsibility to decide those questions, *Manufacturers' Co.* v. *McKey*, 294 U. S. 442, 453, and they are of such nature as to make it particularly appropriate that the Court of Appeals be permitted to initially decide them, *Bates* v. *U. S.*, 323 U. S. 15, 17. Accordingly, the cause should be remanded to the Court of Appeals as was done in *Cahill* and *Bates* (*supra*) and in such cases as *Union Trust Co., et al.* v. *Eastern Airlines, Inc.*, 350 U. S. 962; *Boudoin* v. *Lykes Brothers S.S. Co., Inc.*, 350 U. S. 811; *U. S.* v. *Beach*, 324 U. S. 193, 196; *U. S.* v. *Wrightwood Dairy Co.*, 315 U. S. 110, 126; *Schriber Co.* v. *Cleveland Trust Co.*, 305 U. S. 47, 61.

Alternatively, if the Court should be disposed to decide those questions, respondent asks leave to brief and argue their merits, based on decisions such as those by the Court of Appeals for the Second Circuit in *Comiskey* v. *Pennsylvania Railroad Co.*, 228 F. 2d 687 and *Herring* v. *Luckenbach S.S. Co., Inc.*, 137 F. 2d 598, holding that it is the duty of the District Court to condition a denial of a motion for a new trial upon a remittitur where the verdict is excessive, even though there is sufficient evidence to support a verdict in some amount for plaintiff, and that in passing upon such motion, the District Court has the power to consider whether the jury made proper allowance for contributory negligence.

CONCLUSION

For the foregoing reasons, respondent respectfully prays that its motion be granted.

Dated: New York, New York
December 12, 1957

EUGENE UNDERWOOD
Counsel for Respondent

WILLIAM M. KIMBALL
H. BARTON WILLIAMS
of Counsel

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JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1957

No. 350

PASQUALE PALERMO,

Petitioner,

against

LUCKENBACH STEAMSHIP COMPANY, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S REPLY BRIEF IN SUPPORT OF ITS MOTION TO RECALL AND AMEND THE JUDGMENT

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H. BARTON WILLIAMS,
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Petitioner's brief in opposition misconceives respondent's position. *Neese* v. *Southern Railway Co.*, 350 U. S. 77, upon which petitioner relies, is not in point. In *Neese*, the trial court granted the new trial motion on the ground of excessiveness subject to a remittitur. Here, on the contrary, the trial court refused to consider the merits of respondent's motion on the ground of excessiveness because it deemed itself powerless to grant such a motion. Respondent argued to the Court of Appeals that the District Court did have such power and should have considered the motion on its merits, as was done in *Neese*. The District Court's determination is contrary to the Court of Appeals' decisions in *Comiskey* v. *Pennsylvania Railroad Co.*, 228 F. 2d 687 and *Herring* v. *Luckenbach S.S. Co., Inc.*, 137 F. 2d 598.

Respondent did not ask the Court of Appeals to grant its motion for a new trial, as did the Railroad in *Neese*, but only asked the Court of Appeals to remand, so that the District Court might consider respondent's motion on the merits and exercise powers which the District Court erroneously thought were non-existent. The Court of Appeals expressly refrained from deciding whether to do that because it reversed on another ground.

Petitioner argues that, in holding that the jury was properly instructed as to the effect to be given to contributory negligence, this Court implicitly decided the two points expressly left undecided by the Court of Appeals. That conclusion does not follow. The two undecided questions do not relate to the propriety of the charge. Properly charged juries can and do return excessive verdicts. The undecided questions concern the power and duty of the trial judge, on respondent's new trial motion for excessiveness, to consider whether the jury actually followed his instructions by making an adequate and proper reduction for contributory negligence; and his power and duty to grant a new trial if he found the verdict to be excessive, even though there may have been sufficient evidence of liability to justify recovery by petitioner in some amount.

Respondent has moved to recall and amend the judgment so that these timely raised and undecided questions may be passed upon by an appellate court. It is respectfully submitted that the motion should be granted.

Dated: New York, New York,
December 20, 1957.

EUGENE UNDERWOOD,
Counsel for Respondent.

WILLIAM M. KIMBALL,
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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR REHEARING

EUGENE UNDERWOOD,
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IN THE

Supreme Court of the United States

October Term, 1957

No. 380

PASQUALE PALERMO,

Petitioner,

against

LUCKENBACH STEAMSHIP COMPANY, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR REHEARING

Petitioner prays for a rehearing of this cause and in support thereof respectfully shows:

Statement of the Case

Petitioner, a longshoreman employed by a contracting stevedore, fell and sustained injury while walking on the port side of respondent's vessel toward his work place on the bow. He claimed that the port deck was grease-covered, unlighted and in darkness, but admitted that he knew these conditions in advance. There was evidence that the starboard deck was safe and equally convenient at the time, and that petitioner knew it. The trial court refused to

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PETITIONER'S BRIEF IN OPPOSITION TO MOTION TO RECALL AND AMEND THE JUDGMENT

Statement

Petitioner Palermo urges this Honorable Court to deny respondent's motion as being without merit in law and fact.

Argument

The so-called remaining question is one concerning excessiveness of the verdict, which was fully considered and properly decided adversely to respondent by the trial Judge. (See Opinion Denying Defendant's Post-Trial Motions, page 11a in defendant-appellant's appendix below.) In *Neese* v. *Southern Railway Company*, 350 U. S. 77, 76 S. Ct. 131, reversing 216 F. 2d 772, this Court held it was error for the Court of Appeals to reverse a district Judge who

denied a motion for a new trial where the action of the district Judge was not without support in the record. As the Court below would have to adhere to this decision on any issue of excessiveness, then unnecessary delay and undue harassment of petitioner would result from remanding on an issue that must necessarily be resolved in favor of petitioner.

The record below had been certified to this Court and the so-called remaining issue on excessiveness and whether the District Court had properly exercised his discretion "to determine whether the jury made proper allowance for contributory negligence" had been presented by respondent in its brief in opposition to the petition for a writ of certiorari herein. (See respondent's Statement of the Case, pages 2 to 4 in said brief.) The purported remaining questions were worded as one and differently in respondent's brief to the Court below than it is now presented in the brief in support of the instant motion, then stated as follows:

> "2. Did the Court have power to consider the motion to set aside the verdict and for a new trial on the ground of excessiveness; if so, should it have considered the jury's allowance for contributory negligence" (p. 4 of Brief and Appendix for defendant-appellant below).

For at least two additional factual reasons this specious question should not be the basis of remand and delay in the finality of judgment herein:

1. This Court in its *per curiam* opinion concisely answered this contention by respondent as follows:

> ". . . The jury was properly instructed that the petitioner's negligence, if any, was to be considered in

mitigation of damages under the rule applicable in actions for personal injuries arising from maritime torts."

2. The District Court's final judgment in the amount of $65,000.00, predicated on an opinion that the 45 year old plaintiff "was very seriously injured, and that the right upper extremity of his arm was practically completely disabled, and that at most he had the use of the fingers of his right hand to a very limited extent. He suffered extremely great pain and was subjected to a state of mind which might humiliate him throughout his life" (p. 12a of defendant-appellant's appendix below), was not contested during the trial where respondent did not call a doctor to rebut any of the medical testimony clearly demonstrating the permanent disability and petitioner's inability to ever return to manual work.

Respondent cites the case of *Cahill* v. *New York N. H. & H. R. Co.*, 351 U. S. 183 in support of its extreme request for what is tantamount to an untimely second petition for rehearing. There can be no comparison between the remaining issue in that case related to a serious question of evidence as to prior accidents at the situs, and the "remaining" issue herein on a question that had been considered by this Court, and is additionally without merit because of the clear and unequivocal rulings of this Court that excessiveness is not a matter for appellate review where the record supports the judgment and the trial Judge's decision to let it stand.

That this Court has the power to decide a question expressly left undecided by the Court of Appeals, is stated in *Delk* v. *St. Louis & S. F. R. Co.*, 220 U. S. 580, 31 S. Ct. 617, where after reversing the Court of Appeals on one question, the Court went on to decide the second question

expressly left undecided. Mr. Justice Harlan, speaking for the Court, said:

> "As the case is here upon certiorari to review the judgment of the Circuit Court of Appeals, this court has the entire record before it, with the power to review the action of that court, as well as direct such disposition of the case as that court might have done . . ." (p. 588 of 220 U. S.).
>
> See: *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U. S. 504, 508, 71 S. Ct. 470, 472.

In the original petition herein it was requested that the Court reverse the Court below and "reinstate the original judgment of the district Court . . ." In petitioner's reply brief the prayer included "Summary reversal to the end of a final determination . . ." It must have been considered that the jury verdict of May 8, 1956 on the accident of February 16, 1955, had been unduly protracted as to finality of judgment to the prejudice of the petitioner, and that in the proper exercise of this Honorable Court's power, litigation must cease by the issuance of a mandate to the District Court. This was done and yet again respondent seeks to delay the entry of a final judgment by asking consideration of an issue that is without basis in law or fact.

CONCLUSION

For the foregoing reasons, petitioner respectfully prays that the motion be denied or in the alternative that it be granted solely to summarily resolve any doubt that the remand to the District Court for the entry of a final judgment was predicated on the necessary and proper exercise of this Honorable Court's power and purpose to terminate needless litigation, particularly on a so-called issue that is without merit in law and fact.

Respectfully submitted,

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